United States Court of Appeals
FOR THE EIGHTH CIRCUIT.

No. 17,836.

MISSISSIPPI RIVER FUEL CORPORATION, WILLIAM G. MARBURY, GLENN W. CLARK, D. B. JENKS, SAM B. COOK, JAMES LEE JOHNSON, C. D. PEET, JOHN C. BOLINGER, JR., JAMES M. KEMPER, JR., AND MISSOURI PACIFIC RAILROAD COMPANY,
APPELLANTS,

vs.

ROSE SLAYTON, JOSEPH M. PROSKAUER, WALTER MENDELSON, ALFRED L. ROSE AND DOROTHY B. ROSE; ALLEGHANY CORPORATION, AND EMPIRE TRUST COMPANY, A CORPORATION, AS VOTING TRUSTEE; AND BETTY LEVIN,
APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

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(Complaint in Slayton case.)

(Filed in U. S. District Court on Dec. 9, 1963.)

United States District Court
For the Eastern District of Missouri,
Eastern Division.

Rose Slayton,
Plaintiff,
against
Missouri Pacific Railroad Company, Mississippi River Fuel Corporation, Perry R. Bass, William B. Bates, Glenn W. Clark, Sam B. Cook, Herbert Gussman, D. B. Jenks, James Lee Johnson, James M. Kemper, Jr., William G. Marbury, C. D. Peet, J. T. Suggs, Raymond V. Terry,
Defendants.

Civ. No. 63 C 436 (2).

Plaintiff, complaining of defendants, alleges on information and belief, except paragraphs 1 (b), 2 (a), (b), (d) and (e), which are alleged on knowledge:

1. (a) The jurisdiction of this Court rests on diversity of citizenship.

(b) Plaintiff is a citizen of New York.

(c) Defendant Missouri Pacific Railroad Company ("Mopac") is a citizen of Missouri; it is a corporation organized under Missouri law and has its principal place of business in the City of St. Louis, in the Eastern District, Eastern Division, of Missouri.

(d) Defendant Mississippi River Fuel Corporation ("Mississippi") is a citizen of Delaware and Missouri; it is a corporation organized under Delaware law and has its principal place of business in the City of St. Louis, in the Eastern District, Eastern Division, of Missouri.

(e) The individual defendants are citizens of the states listed opposite their respective names:

Name	State
Perry R. Bass	Texas
William B. Bates	Texas
Glenn W. Clark	Missouri
Sam B. Cook	Missouri
Herbert Gussman	Oklahoma
D. B. Jenks	Missouri
James Lee Johnson	Missouri
James M. Kemper, Jr.	Missouri
William G. Marbury	Missouri
C. D. Peet	Missouri
J. T. Suggs	Texas
Raymond V. Terry	Louisiana

(f) The amount in controversy, exclusive of interest and costs, exceeds $10,000.

2. (a) Plaintiff is the owner and holder of shares of the Class B common stock of Mopac and has been such since February 1963 and at the time of the transactions complained of herein.

(b) Plaintiff brings this action on behalf of herself and representatively on behalf of all other holders of Mopac's Class B common stock.

(c) There are about 1200 holders of Mopac's Class B common stock; they are so numerous as to make it impracticable to bring them all before the Court; plaintiff will fairly insure their adequate representation.

(d) Plaintiff also brings this action derivatively on behalf of Mopac.

(e) The action is not brought collusively to confer upon this Court jurisdiction which it otherwise would not have.

3. (a) Mopac was at all times herein mentioned and now is a common carrier by railroad and did and does own and operate lines of railroad in interstate commerce.

(b) Mopac did at all times herein mentioned and now does own all or a majority of the stocks of several sub-

sidiaries which were and are common carriers by railroad, did and do own and operate lines of railroad in interstate commerce, and were and are controlled by Mopac.

(c) One of such subsidiaries of Mopac was and is the Texas & Pacific Railway ("T&P"), more than 82% of whose stock was and is owned by Mopac.

4. (a) The individual defendants, together with Robert H. Craft, T. C. Davis and Thomas F. Milbank, are the present directors of Mopac.

(b) Thomas F. Milbank and defendants Glenn W. Clark, D. B. Jenks, William G. Marbury and Raymond V. Terry are also directors of defendant Mississippi.

(c) Defendant William G. Marbury, chairman of Mississippi's board and its chief executive officer, is also the chairman of Mopac's executive committee. Defendant D. B. Jenks is Mopac's president. Defendant Raymond V. Terry, a vice president of Mississippi, is a member of Mopac's executive committee. Defendant Glenn W. Clark is Mississippi's president.

5. (a) Mopac's capital stock consists of the following classes and numbers of shares issued and outstanding: —

Class A stock	1,849,176 shares
Class B stock	39,731 shares.

(b) The shares of both classes are without par value; the stated capital represented by each share is $100 per share.

(c) The Class A shares are in the nature of preferred stock. Each Class A share is entitled to non-cumulative dividends of five dollars per year if, when and to the extent such dividend is declared by the board of directors, and such dividends cannot exceed five dollars per share in any calendar year. Upon the liquidation, dissolution or winding up of Mopac, the Class A shares are entitled and limited to receive $100 per share, together with any dividends declared and unpaid.

(d) The Class B shares are in the nature of common stock. Out of any funds available after full dividends to the end of the current calendar year upon the Class A

stock shall have been paid, the holders of the Class B stock are entitled to receive such dividends, without restriction as to amount as, may from time to time be declared by the board of directors. Upon the liquidation, dissolution or winding up of Mopac, the holders of the Class B stock are entitled, to the exclusion of the holders of the Class A stock, to share ratably in all assets of Mopac remaining after payment to the Class A shareholders of the amounts specified in subparagraph (c).

(e) Each Class A share and each Class B share has the same voting power, except that Article VII (D) (3) of Mopac's Articles of Association requires separate resolutions by a majority of the holders of each class of shares for:

I. The issuance of any shares of stock of Mopac in addition to those presently authorized by the Articles of Association;

II. The creation or issuance of any obligation or security of Mopac convertible into or exchangeable for shares of stock of Mopac of any class;

III. Any alteration or change of the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A stock or of the Class B stock; or

IV. The amendment or elimination of any of the provisions of Article VII (D) (3) of the Articles of Association.

(f) The foregoing and all other preferences, qualifications, limitations, restrictions and special or relative rights of the Class A stock and Class B stock, and the terms upon which such stock may be issued, are set forth in Article VII (D) of Mopac's Articles of Association, a copy of which is annexed as **Exhibit A** and incorporated herein by reference.

6. (a) As the result of successive acquisitions of large amounts of Mopac's Class A stock, defendant Mississippi owns 1,059,395 shares of the Class A stock, representing about 56% of the combined voting power of the Class A and Class B stocks.

(b) At all times since in or about 1960, defendant Mississippi did and it now does control Mopac, select and dominate its directors and principal executives and determine its policies and the conduct of its affairs.

(c) Defendant Mississippi acquired control of Mopac without first securing authorization for such acquisition from the Interstate Commerce Commission ("ICC"), in violation of § 5 of the Interstate Commerce Act, 49 USC, § 5.

(d) The acquisition and exercise by defendant Mississippi of its control over Mopac have been and are illegal.

7. The acts and transactions hereinafter alleged have been and will be done and caused by the defendants pursuant to a conspiracy among them and the other directors of Mopac to enrich defendant Mississippi and the other Class A stockholders of Mopac at the expense and to the injury of the Class B stockholders, including plaintiff.

8. (a) On or about December 4, 1963, the boards of directors of Mopac and T&P approved a plan (hereinafter called the "Plan") to merge or consolidate Mopac with T&P and a newly organized Delaware corporation known as Texas & Missouri Pacific Railroad Company ("T&M"), the latter to be the surviving corporation.

(b) Under the Plan each of Mopac's Class A and Class B shares is to be exchanged for four common shares of T&M; and each share of T&P is to be exchanged for 4.8 common shares of T&M.

9. (a) Mopac's board of directors has publicly announced its intention to submit the Plan to Mopac's stockholders and to the ICC for their approval.

(b) Mopac's board further has publicly announced its position that Mopac's Class B stockholders are not entitled to vote separately and apart from the Class A stockholders on the Plan; and it has publicly announced its intention to submit the Plan only to the combined vote of the Class A and Class B stockholders.

10. The Plan is grossly unfair and inequitable to Mopac's Class B stockholders, including plaintiff; its con-

summation would deprive them of their property without due process of law to the benefit and profit of defendant Mississippi and the other Class A stockholders of Mopac, in violation of Mopac's Articles of Association, the laws of Missouri and the Constitutions of the United States and the State of Missouri, in that the value of one Class B share is many times greater than the value of one Class A share, whereas the Plan purports to allot the same number of T&M shares to each of the Class A and Class B shares. More particularly:

(a) The earnings value of each Class B share is many times greater than the earnings value of each Class A share (par. 11, *infra*).

(b) The asset value of each Class B share is many times greater than the asset value of each Class A share (par. 12, *infra*).

(c) The market price of each Class B share is many times greater than the market price of each Class A share (par. 13, *infra*).

11. (a) Mopac's consolidated net earnings since 1959 have been in about the following amounts:

1959	$16.4 million
1960	13.0 "
1961	12.6 "
1962	22.2 "
Nine months ending Sept. 30, 1963	17.5 "

(b) The maximum possible interest of the Class A shares in Mopac's annual earnings was and is five dollars per share, or an aggregate of $9,245,880 for all the 1,849,176 Class A shares outstanding. Actually, the dividends declared and paid on the Class A shares have been substantially less than five dollars per share in each year since the creation of the Class A stock in 1956.

(c) The balance of Mopac's earnings remaining available and applicable to each Class B share has been since 1959:

1959	$174
1960	90
1961	79
1962	328
Nine months ended Sept. 30, 1963	263

(d) Thus in 1962 and the first nine months of 1963 the interest of each Class B share in Mopac's consolidated earnings was, respectively, 65 times and 70 times as great as the corresponding interest of each Class A share in such earnings.

12. (a) As of December 31, 1962 (the latest available balance sheet date), Mopac's consolidated net assets applicable to the Class A and Class B shares amounted to $380,178,000.

(b) After deduction of $184,333,000, i. e., $100 for each of the then outstanding 1,843,326 Class A shares, the consolidated net assets of Mopac available and equitably belonging to the Class B stockholders amounted to $195,845,000.

(c) As of December 31, 1962, the net asset value of each of Mopac's Class A shares was $100, whereas the net asset value of each of Mopac's then outstanding 39,731 Class B shares was $4,929.

(d) As of December 31, 1962, the net asset value of each Class B share was more than 49 times as great as the net asset value of each Class A share.

(e) No substantial change in the proportion of the net asset values of the Class A and Class B shares has taken place since December 31, 1962.

13. (a) Mopac's Class A shares were at all times herein mentioned and now are listed and actively traded on the New York Stock Exchange.

(b) Mopac's Class B shares were at all times herein mentioned and now are traded in the over-the-counter market.

(c) The market price ranges of Mopac's Class A and Class B shares since 1956 have been:

Year	Class A Shares High	Class A Shares Low	Class B Shares (Bid Prices) High	Class B Shares (Bid Prices) Low
1956	47½	35⅛	700	410
1957	44¼	19¾	670	160
1958	43⅞	20	500	160
1959	52⅜	41⅝	550	330
1960	48½	33¾	510	265
1961	50⅞	37⅛	500	290
1962	51¼	35¼	380	230
1963 (prior to the announcement of the Plan)	73¼	48⅝	700	365

(d) Although since 1959 the market price of Mopac's Class A shares has been buoyed by defendant Mississippi's repeated purchases of large amounts of such shares in the market and through invitation of tenders, the market price of the Class B stock has continued to be many times as high as that of the Class A stock.

(e) Upon the announcement of the Plan, the bid price of the Class B shares dropped from 500 to 200.

14. The Plan and its public announcement are a fraudulent and manipulative device adopted by defendants to enhance the value of the Class A shares at the expense and to the detriment of the holders of the Class B shares.

15. (a) Contrary to the public announcement by Mopac's board of directors, the approval of the Plan requires a separate vote of the Class B shareholders apart from the vote of the Class A shareholders.

(b) If the Class B stockholders are permitted to vote separately, the Plan has no prospect of being approved.

(c) The public announcement of Mopac's board of directors that the Plan can be approved by a combined vote of the Class A and Class B stockholders is a further part of their scheme to enhance the value of the Class A shares at the expense and to the detriment of the holders of the Class B shares.

16. (a) In or about 1957, Mopac's board of directors, then free of control by defendant Mississippi, appointed a committee to study the feasibility and advisability of a merger of Mopac and T&P.

(b) After conducting its study, the committee advised against the merger on the grounds, among others, that both railroads had operated jointly at all common points for many years, that the merger would be an end-to-end merger, and that it would not produce the economies often present in a merger of parallel lines.

(c) In 1958, Mopac's board of directors, then still free of control by defendant Mississippi, concluded that a merger with T&P should not be undertaken.

(d) No substantial change of circumstances favoring a merger of Mopac and T&P has occurred since 1958.

(e) The merger or consolidation of Mopac and T&P proposed by the Plan serves no valid or legitimate business purpose of Mopac, but is a device to enhance the value of Mopac's Class A shares at the expense and to the detriment of the holders of the Class B shares.

17. (a) As hereinbefore alleged (par. 6), defendant Mississippi's acquisition and exercise of control over Mopac was and is illegal.

(b) The adoption of the Plan by Mopac's board of directors results from the illegal exercise by Mississippi of its control over Mopac.

(c) All further steps by Mopac and its board of directors to effectuate the Plan will be the result of the illegal exercise of control by Mississippi.

(d) It will be illegal for Mississippi to vote its controlling Class A shares of Mopac in favor of the Plan, as it intends to do.

18. (a) The approval of the Plan by Mopac's stockholders would cause irreparable injury to the Class B stockholders, including plaintiff.

(b) The consummation of the Plan would cause irreparable injury to the Class B stockholders, including plaintiff.

(c) The call of a meeting of Mopac's stockholders to vote on the approval of the Plan would cause irreparable injury to the Class B stockholders, including plaintiff.

(d) The call of a meeting of Mopac's stockholders to vote on the approval of the Plan, without provision for separate votes to be cast by the Class A and the Class B stockholders, would cause irreparable injury to the Class B stockholders, including plaintiff.

(e) The casting by Mississippi of the votes of its controlling Class A shares in favor of the Plan would cause irreparable injury to the Class B stockholders, including plaintiff.

(f) The call of a stockholders' meeting to vote on the approval of the Plan and the submission of the Plan to the ICC would cause great and irreparable loss and expense to Mopac.

19. Demand upon the board of directors of Mopac to bring this action is unnecessary and would be futile because:

(a) The essential cause of action herein alleged belongs to Mopac's Class B stockholders; it could not be asserted by Mopac or its board of directors.

(b) To the extent that a claim is alleged herein on behalf of Mopac, the actions of Mopac's board of directors herein alleged and the control of the board by Mississippi demonstrate the hostility of the board to the assertion of such claim and the inability of the board to prosecute the claim effectively.

20. Plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays for judgment:

1. Enjoining defendants temporarily and permanently from taking any steps for the approval or consummation of the Plan;

2. Declaring that Mopac's Class B stockholders are entitled to vote separately and apart from the Class A stockholders on the approval of the Plan;

3. Requiring Mississippi and the individual defendants to account to Mopac and to the Class B stockholders for the damages sustained by Mopac and the Class B stockholders and for the profits derived by Mississippi and the individual defendants;

4. Awarding plaintiff the costs and expenses of this action, including reasonable counsel fees;

5. Granting plaintiff such other and further relief as may be just.

ACKERT, GIESECKE & TOMPKINS,
By H. C. ACKERT,
Attorneys for Plaintiff,
Office & P. O. Address
611 Olive Street,
St. Louis, Missouri.

POMERANTZ, LEVY, HAUDEK & BLOCK,
Of Counsel,
Office & P. O. Address
295 Madison Avenue,
New York 17, New York.

Exhibit A.

Articles of Association of Missouri Pacific Railroad Company.

Article VII, Section D.

D. The preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock and the Class B Stock, and the terms upon which such stock shall be issued are as follows:

(1) The holders of Class A Stock shall be entitled to receive, when and as declared by the Board of Directors, dividends in cash in an amount not exceeding $5 per share in any calendar year, and no more, payable at such time or times as may be determined by the Board of Directors. Such dividends may be paid out of any funds lawfully available for such purpose, but no dividend on the Class A Stock

shall be paid in the form of stock or notes or in any form other than cash or its equivalent. No right as to such dividends shall accrue unless and until declared and such dividends shall be non-cumulative without regard to the availability in any calendar year of earnings or any other funds lawfully available for the payment of dividends. Dividends paid on the Class A Stock shall not in any event exceed $5 per share in any calendar year. In any calendar year, including the calendar year 1956, full dividends in cash in the amount of $5 per share shall be paid upon the outstanding Class A Stock, or declared and a sum sufficient for the payment thereof set apart for such payment, before any sum or sums shall be set aside for or applied to the purchase of Class A Stock and before any dividends shall be declared or paid upon or set apart for, or any other distribution shall be ordered or made in respect of, the Class B Stock, and before any shares of Class B Stock shall be purchased, or otherwise acquired by the Company. Out of any funds lawfully available therefor remaining after full dividends to the end of the current calendar year upon the Class A Stock then outstanding shall have been paid, or declared and a sum sufficient for the payment thereof set apart for such payment, the holders of the Class B Stock shall, subject to the provisions hereof, be entitled to receive such dividends, without restriction as to amount, as may from time to time be declared by the Board of Directors. The rights of the holders of capital stock of the Company with respect to dividends shall at all times be subject to the power of the Board of Directors from time to time to set aside such reserves and to make such other provisions, if any, as said Board shall deem to be necessary or advisable for working capital, for expansion of the business of the Company, including the acquisition of real and personal property, and for any other purpose of the Company.

(2) In the event of any liquidation or dissolution or winding up of the Company, whether such liquidation, dissolution or winding up shall be voluntary or shall be involuntary, the holders of the Class A Stock shall be entitled to receive, out of the assets of the Com-

pany available for distribution to its stockholders, before any distribution of assets shall be made to the holders of the Class B Stock, the sum of $100 per share together with such dividends, if any, as may have been declared thereon and not paid; and the holders of the Class B Stock shall be entitled, to the exclusion of the holders of the Class A Stock, to share ratably in all the assets of the Company then remaining. If upon any liquidation or dissolution or winding up of the Company the net assets of the Company shall be insufficient to pay the holders of all outstanding shares of the Class A Stock the full amounts to which they shall be entitled, the holders of shares of Class A Stock shall share ratably in any distribution of assets. Neither the merger nor consolidation of the Company into or with any other corporation, nor the merger or consolidation of any other corporation into or with the Company, nor a sale, transfer or lease of all or any part of the assets of the Company, shall be deemed to be a liquidation, dissolution or winding up of the Company.

(3) The Company shall not, without the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding, (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3).

(4) Except as otherwise provided above in paragraph (3) of this Article VII, or as otherwise required by law, each share of Class A Stock and each share of Class B Stock shall have the same voting

power, and the vote of the holders of all or any portion of any class of stock, as a class, shall not be required for any other action whatsoever to be taken or authorized by the stockholders of the Company, including any amendment to the Articles of Association. In all elections of directors each stockholder may cast as many votes in the aggregate as shall equal the number of voting shares which he is entitled to vote multiplied by the number of directors to be elected at the election, and each stockholder may cast the whole number of votes, either in person or by proxy for one candidate, or distribute them among two or more candidates, and the directors shall be those persons, in a number equal to the vacancies to be filled, who shall receive the greatest number of votes.

(5) Except as otherwise provided in this Article VII, authorized but unissued shares of capital stock of the Company may be issued for lawful consideration in such manner, at such time or times, at such price or prices, and on such other terms and conditions as may be determined by the Board of Directors.

(6) Each holder of Class A Stock shall, as such holder, have the right to purchase or subscribe for his pro rata share of any Class A Stock, or any obligations or securities the Company may issue or sell that shall be convertible into, or exchangeable for, or entitle the holders thereof to subscribe for or purchase, any shares of Class A Stock. Each holder of Class B Stock shall, as such holder, have the right to purchase or subscribe for his pro rata share of any Class B Stock, or any obligations or securities the Company may issue or sell that shall be convertible into, or exchangeable for, or entitle the holders thereof to subscribe for or purchase, any shares of Class B Stock. Except as hereinbefore provided in this paragraph (6), no holder of shares of capital stock of the Company shall, as such holder, have any right to purchase or subscribe for any shares of capital stock of the Company of any class, or any obligations or securities the Company may issue or sell that shall be convertible into, or exchangeable for, or entitle the holder thereof to subscribe for or purchase,

any shares of capital stock of the Company. Rights accorded in this paragraph (6) to the holders of Class A Stock and to the holders of Class B Stock, respectively, may be waived by the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of Class A Stock or Class B Stock, respectively, then outstanding.

State of New York }
County of New York } ss.

Rose Slayton, being duly sworn, deposes and says that she is the plaintiff in the within action; that she has read the foregoing complaint and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Sworn to before me this 7th day of December, 1963.

ROSE SLAYTON.

(Memorandum approved by Court authorizing adding of parties plaintiff and amendment of complaint by interlineation, in Slayton case.)

(Filed in U. S. District Court on January 31, 1964.)

Memorandum for Clerk.

By leave of Court Joseph M. Proskauer, Walter Mendelsohn, Alfred L. Rose and Dorothy B. Rose permitted to join as parties plaintiff in the above entitled cause, and the Complaint therein is amended by interlineation, by leave, in the following respects:

1. By adding the names Joseph M. Proskauer, Walter Mendelsohn, Alfred L. Rose and Dorothy B. Rose in the caption thereof as parties plaintiff.

2. By revising Paragraph 1. (b) so as to read:

"Plaintiffs are citizens of New York."

3. By adding in line 1, Paragraph 2. (a), following the word "Plaintiff", the words "Rose Slayton", and by adding at the end of said Paragraph the following: "Plaintiff Joseph M. Proskauer is the owner and holder of 100 shares of the Class B common stock of Mopac; plaintiff Walter Mendelsohn is the owner and holder of 50 of such shares; plaintiff Alfred L. Rose is the owner and holder of 50 such shares; plaintiff Dorothy B. Rose is the owner and holder of 50 of such shares; and each of such plaintiffs has been such since prior to the filing of the Complaint herein and at the times of the transactions complained of herein."

4. By changing the word "plaintiff" in every other place where it appears in said Complaint from singular to plural.

ACKERT, GIESECKE & TOMPKINS,
By H. C. ACKERT,
Attorneys for Plaintiffs.

GILBERT P. STRELINGER,
Attorney for Defendant Missouri Pacific Railroad Company.

BRYAN, CAVE, McPHEETERS & McROBERTS,
By MARION S. FRANCIS,
Attorneys for Defendants Mississippi River Fuel Corporation, William G. Marbury, D. B. Jenks, Glenn W. Clark, Sam B. Cook, James Lee Johnson and C. D. Peet.

(Memorandum of Court granting Extension of Time to file Memorandum by Missouri Pacific Railroad Company in support of its Motion to Dismiss in Slayton case.)

(Filed in U. S. District Court February 25, 1964.)

Memorandum for Clerk.

By leave of Court, defendant Missouri Pacific Railroad Company granted to and until the 16th day of March,

1964, to file a memorandum in support of its Motion to Dismiss.

GUILFOIL, CARUTHERS, SYMINGTON, MONTREY & DANIEL,
By GERALD M. SMITH,
434 Paul Brown Building,
Saint Louis 1, Missouri,
CHestnut 1-6890,
Attorneys for Defendant Missouri Pacific Railroad Co.

Copy served on all parties this 25th day of February, 1964.

GERALD M. SMITH.

Separate Motion of Defendant Missouri Pacific Railroad Company to Dismiss.

(Filed in U. S. District Court on February 25, 1964, in Slayton case.)

Comes now the defendant Missouri Pacific Railroad Company, and moves the Court to dismiss plaintiffs' Complaint as Amended in this cause, and in support of said motion, states that:

1. A portion of the relief sought by plaintiffs against this defendant relates to the reasonableness or unreasonableness of a certain plan of consolidation. This Court is without jurisdiction to grant relief in these premises as the matter of the reasonableness or unreasonableness of said plan is under the exclusive, plenary and sole jurisdiction of the Interstate Commerce Commission (Sec. 5 of Title 49, U. S. C. A.); and further, this Court has no jurisdiction over said subject matter because plaintiffs have failed to exhaust their administrative remedies provided under the Interstate Commerce Act.

2. A portion of the relief sought by plaintiffs against this defendant relates to the voting rights of this defendant's stockholders in respect to the plan of consolidation referred to in plaintiffs' Complaint. Plaintiffs have failed to set forth facts in their Complaint stating a cause of action as to this defendant with respect to said voting

rights. Plaintiffs have further failed to set forth facts in their Complaint establishing their rights to the declaratory relief prayed as to their voting rights or to the voting rights of any of defendant's stockholders. Plaintiffs' Complaint as Amended, including Exhibit A attached thereto, shows on its face that the holders of the Class B stock of this defendant are not entitled to vote separately and apart from the holders of the Class A stock of this defendant on the question of the approval of the said plan of consolidation, but to the contrary, explicitly shows that on any vote on the plan of consolidation, the vote of the holders of any proportion of either the Class A or Class B stock, as a class, is not required for the approval of such plan of consolidation.

3. The remainder of the relief plaintiffs seek is in the nature of a derivative suit for the benefit of this defendant. The allegations relating to such derivative action contained in the Complaint fail to state any facts establishing a claim for such derivative relief. Further, said allegations show on their face, that any claim sought to be asserted by plaintiffs is premature and that said allegations do not state a justiciable controversy.

Wherefore, defendant Missouri Pacific Railroad Company moves this Court to enter its order dismissing plaintiffs' Complaint as Amended.

Oral argument requested.

MARK M. HENNELLY,
GILBERT P. STRELINGER,
2003 Missouri Pacific Building,
Saint Louis 3, Missouri,
MAin 1-1000,

GUILFOIL, CARUTHERS, SYMINGTON,
MONTREY & DANIEL,
434 Paul Brown Building,
Saint Louis 1, Missouri,
CHestnut 1-6890,

Attorneys for Defendant Missouri Pacific Railroad Co.

Copy of the foregoing Motion to Dismiss served on plaintiffs by mailing a copy of same to Harold Ackert,

Esq., attorney for plaintiffs; Bryan, Cave, McPheeters & McRoberts, attorneys for Mississippi River Fuel Corporation, and the individual defendants, this 25th day of February, 1964.

GERALD M. SMITH.

Separate Motion of Defendants Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson and C. D. Peet to Dismiss.

(Filed in U. S. District Court on Feb. 26, 1964, in Slayton case.)

Come now the defendants Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson and C. D. Peet, by this their separate motion, and move the Court to dismiss the above-entitled action because the Amended Complaint, which purports to state three claims for relief, shows on its face (a) that this Court lacks jurisdiction over the subject matter of the first of such claims for relief; (b) that this Court lacks jurisdiction over the subject matter of the second of such claims for relief in that it is contingent upon the Court's prior determination of the first of such claims (over which it has no jurisdiction), that such claim is premature, and that such claim is not one upon which relief can be granted; and (c) that the balance of such Amended Complaint, which purports to set forth the third claim for relief, fails to state a claim upon which relief can be granted; all as hereinafter set out with more particularity.

(a) With respect to the first claim for relief:

All of the paragraphs of said Amended Complaint numbered 5(c), (d), 6(b), (c), (d), 7, 8(b), 10, 11, 12, 13, 14, 15(b), (c), 16, 17, 18(a), (b), (c), (e), (f), and 19(a), and paragraph numbered 1 of the prayer thereof, relate to matters pertaining to a Plan of Consolidation submitted to the Interstate Commerce Commission by the defendant Missouri Pacific Railroad Company, and others, wherein Plaintiffs seek to have this Court investigate and con-

sider the terms, provisions and conditions of such Plan of Consolidation, pass upon its merits, determine its fairness, justice, reasonableness, and legality, and, in general, to decide whether or not it may lawfully be submitted to the stockholders of Missouri Pacific Railroad Company and to the Interstate Commerce Commission for its consideration and approval. This Court has no jurisdiction over the subject matter of such claim for relief because the Interstate Commerce Commission has the primary, sole, exclusive and plenary jurisdiction over said Plan of Consolidation and all matters incident thereto pursuant to the provisions of Section 5 of the Interstate Commerce Act, 49 U. S. C., § 5, and Plaintiffs have a complete and adequate remedy under said Section 5 of said Interstate Commerce Act, which Plaintiffs must exhaust and have not exhausted. Accordingly, any claim for relief purported to be alleged in the above-mentioned paragraphs of said Amended Complaint must be dismissed by this Court for lack of jurisdiction over the subject matter.

(b) With respect to the second claim for relief:

All of the paragraphs of said Amended Complaint numbered 2(d), (e), 4 and 19(b) and paragraph numbered 3 of the prayer thereof, relate to a purported derivative action brought by Plaintiffs on behalf of the defendant Missouri Pacific Railroad Company in connection with the said Plan of Consolidation which has been submitted to the Interstate Commerce Commission. As pointed out above, this Court has no jurisdiction over said Plan of Consolidation, or over any part thereof, or to pass upon the merits, fairness, reasonableness or legality thereof. Before this Court could pass upon or grant said second claim for relief it would be necessary for this Court to first pass upon and rule adversely to the merits of said Plan of Consolidation, which it has no jurisdiction to do. Whether or not Plaintiffs have or can have any derivative cause of action such as that set forth in said second claim for relief cannot be determined until after the Interstate Commerce Commission shall have considered and passed upon said Plan of Consolidation and the ruling of the Commission shall have been finally disposed of upon appeal to the Courts in the manner provided by law. Then and only then can this or any Court determine whether

or not Missouri Pacific Railroad Company, or any of its stockholders, has any cause of action against Mississippi River Fuel Corporation and/or any of Missouri Pacific Railroad Company's directors. Accordingly, any claim for relief purported to be alleged in the above-mentioned paragraphs of said Amended Complaint must be dismissed by this Court for lack of jurisdiction over the subject matter, because such claim for relief is premature and because such claim is not one upon which relief can be granted.

(c) With respect to the third claim for relief:

All of the paragraphs of said Amended Complaint numbered 1, 2(a), (b), (c), 3, 5(a), (b), (e), (f), 6(a), 8(a), 9, 15(a), and 18(d) and paragraph numbered 2 of the prayer thereof, relate to a claim for relief whereupon Plaintiffs seek the determination and decision of this Court declaring that the holders of the Class B common stock of the defendant Missouri Pacific Railroad Company are entitled to vote separately and apart from the holders of the Class A common stock of the Missouri Pacific Railroad Company on the approval of the said Plan of Consolidation which has been submitted to the Interstate Commerce Commission. Said Amended Complaint on its face, including Exhibit A attached thereto and made a part thereof, shows that the holders of said Class B common stock are not entitled to vote separately and apart from the holders of the Class A common stock of the defendant Missouri Pacific Railroad Company on the question of the approval of said Plan of Consolidation, but, on the contrary, affirmatively shows that at any meeting of the stockholders of defendant Missouri Pacific Railroad Company called to vote upon said Plan of Consolidation the holders of the Class A and Class B common stock shall have the same voting power, and that the vote of the holders of any proportion of either of said classes of common stock, as a class, shall not be required for the approval of such Plan of Consolidation. Accordingly, the claim for relief set out in the above numbered paragraphs must be dismissed for failure to state a claim upon which relief can be granted.

Wherefore, the said defendants pray the judgment of this Court dismissing the said three claims for relief, and

each of them, as set forth above, and hence of the cause or causes of action purported to be set forth in Plaintiffs' Amended Complaint.

Oral Argument requested.

BRYAN, CAVE, McPHEETERS & McROBERTS,
1600 Boatmen's Bank Building,
St. Louis, Missouri 63102,
By R. H. McROBERTS,
By GAYLORD C. BURKE,

HENDREN & ANDRAE,
Central Trust Building,
Jefferson City, Missouri,
By JOHN H. HENDREN,

Attorneys for Defendants,
Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson, C. D. Peet.

Certificate of Service.

I hereby certify that the foregoing Separate Motion of Defendants Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson and C. D. Peet to Dismiss was served upon the Plaintiffs by mailing a copy to their attorneys, Ackert, Giesecke & Tompkins, at 611 Olive Street, St. Louis, Missouri 63101, and on the defendant Missouri Pacific Railroad Company by mailing a copy to its attorney, Gilbert P. Strelinger, 2003 Missouri Pacific Building, St. Louis, Missouri 63103, all on this 26th day of February, 1964.

R. H. McROBERTS,
Attorney for Defendants,
Mississippi River Fuel Corporation, et al.

(Amended Complaint—as Amended February 28, 1964—in Alleghany case.)

(Filed in U. S. District Court on February 25, 1964.)

United States District Court
For the Eastern District of Missouri,
Eastern Division.

Alleghany Corporation, Empire Trust Company, a corporation, as Voting Trustee, Plaintiffs, against Missouri Pacific Railroad Company, Mississippi River Fuel Corporation, Perry R. Bass, William B. Bates, Glenn W. Clark, Sam B. Cook, Herbert Gussman, D. B. Jenks, James Lee Johnson, James M. Kemper, Jr., William G. Marbury, John C. Bolinger, Jr., J. T. Suggs, Raymond V. Terry, Defendants.	Civ. No. 64C-48(2).

Plaintiffs allege on information and belief except as to paragraphs 1, 2 (a)-(b), 3 (a)-(c), 4 (a)-(d), 5 (a), 6 (a), 7 (a)-(j), 12, 14, 17 (a)-(b), 21-24 which are alleged on knowledge:

First Count.

1. The jurisdiction of this Court rests on diversity of citizenship of the parties. The amount in controversy, exclusive of interest and costs, exceeds $10,000.

2. (a) Plaintiff Alleghany Corporation ("Alleghany") is a Maryland corporation and has its principal place of business in the City and State of New York.

2. (b) Plaintiff Empire Trust Company ("Empire") is a New York corporation and has its principal place of business in the City and State of New York.

3. (a) Defendant Missouri Pacific Railroad Company ("MoPac") is a Missouri corporation and has its principal place of business in the City of St. Louis, Eastern District, Eastern Division of Missouri.

3. (b) Defendant Mississippi River Fuel Corporation ("Mississippi") is a Delaware corporation and has its principal place of business in the City of St. Louis, Eastern District, Eastern Division of Missouri.

3. (c) The individual defendants are directors of MoPac and are citizens of the states listed opposite their respective names:

Name	State
Perry R. Bass	Texas
William B. Bates	Texas
Glenn W. Clark	Missouri
Sam B. Cook	Missouri
Herbert Gussman	Oklahoma
D. B. Jenks	Missouri
James Lee Johnson	Missouri
James M. Kemper, Jr.	Missouri
William G. Marbury	Missouri
John C. Bolinger, Jr.	Missouri
J. T. Suggs	Texas
Raymond V. Terry	Louisiana

4. (a) Plaintiff Alleghany from February 3, 1958 has been and still is the beneficial owner of in excess of 20,000 shares of Class B common stock of MoPac, constituting in excess of 50% of such stock outstanding. Such shares have a present book value in excess of $100,000,000 which, as is hereinafter more particularly alleged, would be reduced by defendants' proposed merger to a book value of less than $5,000,000.

4. (b) Plaintiff Empire under and by virtue of a voting trust agreement between it and Alleghany dated June 11, 1957, and amendment thereto dated December 12, 1957, holds the above shares of Class B common stock of MoPac as Voting Trustee for Alleghany.

4. (c) Plaintiff Alleghany, together with plaintiff Empire, brings this action on behalf of Alleghany and repre-

sentatively on behalf of all other holders of MoPac Class B common stock and also derivatively on behalf of MoPac.

4. (d) This action is not brought collusively to confer upon this Court jurisdiction which it otherwise would not have.

5. (a) MoPac was at all times herein mentioned and now is a common carrier by railroad and did and does own and operate lines of railroad in interstate commerce.

5. (b) MoPac did at all times herein mentioned and now does own all or a majority of the stocks of several subsidiaries which were and are common carriers by railroad, which did and do own and operate lines of railroad in interstate commerce, and were and are controlled by MoPac.

5. (c) One of such subsidiaries of MoPac was and is the Texas & Pacific Railway Company ("T&P"). Of T&P's total of approximately 445,464 shares of issued and outstanding common stock, approximately 369,111 shares are owned by MoPac.

6. (a) In addition to the individual defendants, Robert H. Craft, T. C. Davis and Thomas F. Milbank, are also directors of MoPac.

6. (b) Defendant Marbury is a director and chairman of Mississippi's board and is a director of MoPac and chairman of its executive committee.

Defendant Jenks is a director of Mississippi and a director, member of the executive committee and president of MoPac.

Defendant Terry is a director, member of the executive committee and vice president of Mississippi and a director of MoPac and a member of its executive committee.

Defendant Clark is a director, member of the executive committee and president of Mississippi and a director of MoPac.

Defendant Bolinger is a director and executive vice president of Mississippi and a director of MoPac.

Milbank is a director of Mississippi and a member of its executive committee and a director of MoPac.

7. (a) MoPac's capital stock as of December 16, 1963, consisted of the following classes and numbers of shares issued and outstanding:

Class A stock.....	1,849,576 shares
Class B stock.....	39,731 shares

7. (b) The shares of both classes are without par value. The stated capital represented by each share is $100 per share.

7. (c) The aforesaid Class A and Class B shares were issued pursuant to the plan of reorganization of the Missouri Pacific Railroad Company and subsidiaries which was approved by the Interstate Commerce Commission on or about July 29, 1954 (290 ICC 477) approved by this Court on February 25, 1955, and confirmed by this Court on September 19, 1955.

7. (d) Pursuant to said plan, the Class A shares, with one minor exception not relevant here, were issued to holders of preferred stock of Missouri Pacific Railroad Company on the basis of one share of Class A for each $100 par value of such preferred stock and one share of Class A for each $100 of dividends accumulated on such preferred stock.

7. (e) Pursuant to said plan and as provided in Article VII, Section D of the Certificate of Amendments to the Articles of Association of MoPac, copy of which section is annexed hereto as Exhibit A, each Class A share is entitled to non-cumulative dividends of five dollars per year if, when and to the extent such dividend is declared by the board of directors, and such dividends cannot exceed five dollars per share in any calendar year. The Class A shares are non-participating and are not convertible into any other class of stock or security. Upon the liquidation, dissolution or winding up of MoPac, the Class A shares are entitled to receive $100 per share and no more, together with any dividends declared and unpaid.

7. (f) Pursuant to said plan, 40,657.17 Class B shares were authorized to be issued to the holders of common stock of Missouri Pacific Railroad Company on the basis of one share of $100 stated value of Class B stock for each 20 shares of $100 par value of common stock of Missouri Pacific Railroad Company. Alleghany as holder of 396,000 shares of such common stock received in exchange therefor 19,800 shares of its present holdings of Class B stock.

7. (g) Pursuant to said plan and as provided in Article VII, Section D, of the Certificate of Amendments to the Articles of Association of MoPac, out of any funds available after full dividends to the end of the current calendar year upon the Class A stock shall have been paid, the holders of the Class B stock are entitled to receive such dividends, without restriction as to amount, as may from time to time be declared by the board of directors. Upon the liquidation, dissolution or winding up of MoPac, the holders of the Class B stock are entitled, to the exclusion of the holders of the Class A stock, to share ratably in all assets of MoPac remaining after payment to the Class A shareholders of the amounts specified in paragraph 7. (e) above.

7. (h) Said plan of reorganization, as approved by the Interstate Commerce Commission and as approved by this Court on February 25, 1955, directed that "The certificate of incorporation [of the reorganized corporation] . . . shall specifically provide that the new company shall not alter or change the rights of holders of either class of stock or authorize the issuance of additional shares of either class or of any other class . . ., without the consent of the holders of not less than a majority of the number of shares of common stock of each class at the time outstanding" (290 ICC 477, at p. 665).

7. (i) The aforesaid Certificate of Amendments to the Articles of Association of MoPac provides in Article VII, paragraph D (3) that the Company shall not alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A stock

or of the Class B stock, or amend or eliminate any of the provisions of said paragraph D (3), without the consent of the holders of at least a majority of the shares of Class A stock outstanding and at least a majority of the holders of Class B stock outstanding.

7. (j) The aforesaid Certificate of Amendments to the Articles of Association of MoPac provides in Article VII, paragraph D (4) that, except as otherwise provided in Article VII, paragraph D (3) of said Certificate of Amendments, or as otherwise required by law, each share of Class A stock and Class B stock shall have the same voting power and the vote of the holders of any class as a class shall not be required for any action to be taken or authorized by the stockholders of MoPac.

8. (a) The purpose and effect of the aforesaid plan of reorganization was to fix the equity of the former preferred stockholders of Missouri Pacific Railroad Company in the reorganized company at a maximum amount equivalent to the par value of their preferred stock and accumulated dividends thereon in the debtor company, to-wit, approximately $185,652,815, and to vest in the former common stockholders of Missouri Pacific Railroad Company, including plaintiff Alleghany, who received the Class B stock, the balance of the equity and potential equity in the reorganized company.

8. (b) Following the consummation of the aforesaid plan of reorganization, the equity of the Class B shares in MoPac (as shown on a consolidated basis) has in every year increased, rising from approximately $159,485,000 at the end of 1956 to in excess of $209,000,000 as of September 30, 1963, so that the same now exceeds the total equity of all Class A shares by approximately $25,000,000. The equity per share of Class B has thus risen to $5,280.59 per share as of September 30, 1963, as against $100 per share of Class A.

8. (c) In 1959, 1960, 1961 and 1962, consolidated net income of MoPac was $16,433,000, $13,020,000, $12,579,000 and $22,250,000 respectively and earnings attributable to

the Class B stock, after required findings and after dividends paid on the Class A stock, were $4,131,000, $220,000, $1,297,000 and $9,912,000 respectively, or $101.63, $5.41, $31.96 and $249.48 per share of Class B stock.

9. Commencing in of about 1959 the defendants Mississippi and MoPac acting through the defendant Marbury and the directors of MoPac entered upon and have continued and are continuing to engage in a conspiracy and plan and course of action, in violation of their fiduciary duties to the voting minority of Class B stockholders, to obtain and thereafter to exercise voting control of MoPac for the purpose of divesting the Class B stockholders of MoPac of virtually all of their equity in the corporation and to transfer the same to the Class A stockholders and to give to the Class A stockholders unlimited participation in the earnings of MoPac contrary to law, to the plan of reorganization of the Company as approved and directed by the Interstate Commerce Commission and this Court, and to the Articles of Association of MoPac.

10. (a) Commencing in or about 1960, defendant Mississippi having first acquired working control and thereafter having acquired actual control of MoPac, has dominated its directors and principal executives and has determined its policies and the conduct of its affairs.

10. (b) In May 1958 defendant Marbury, then and now chairman of the board and chief executive officer of Mississippi, was elected to the board of MoPac.

10. (c) During 1959 Mississippi acquired 247,200 shares of Class A stock of MoPac, constituting some 13% of the total of MoPac's voting stock, and making Mississippi the single largest holder of Class A shares in MoPac, and defendant Terry, then and now a director of Mississippi, was added to the MoPac board.

10. (d) During 1960 Mississippi acquired an additional 227,200 shares of Class A stock of MoPac, increasing its voting strength to some 25%.

10. (e) During 1961 Mississippi acquired an additional 131,300 shares of Class A stock of MoPac, increasing its voting strength to some 32%, and defendant Clark, then and now president and a director of Mississippi, was added to the MoPac board.

10. (f) During 1962, an exchange offer was made by Mississippi to Class A stockholders of MoPac to exchange their MoPac Class A stock for stock of Mississippi on the basis of four shares of Mississippi stock for three of MoPac Class A. Pursuant to the aforesaid conspiracy, Mississippi caused MoPac to encourage its Class A shareholders to exchange their shares for Mississippi shares in acceptance of Mississippi's exchange offer. As a consequence thereof, Mississippi increased its holdings of Class A stock of MoPac to approximately 980,000 shares, constituting some 52% of the total of MoPac voting stock, and Thomas F. Milbank then and now a director of Mississippi, and Roscoe C. Hobbs, then a director of Mississippi, were added to the MoPac board.

10. (g) In 1963 Mississippi further increased its holdings of Class A stock of MoPac to approximately its present total of 1,071,895, which constitutes some 57% of the total of MoPac voting stock, and defendant Bolinger, then and now a director of Mississippi, was added to the MoPac board, and defendant Jenks, then and now President and a director of MoPac was elected to the Mississippi board.

11. Since 1958 MoPac has at all times controlled T&P and has dominated its board of directors.

12. On December 3 and 4, 1963, defendants caused the boards of directors of T&P and MoPac, respectively, to approve a merger of T&P into MoPac by the mechanism of merging both companies into a newly-created Delaware subsidiary of MoPac called Texas & Missouri Pacific Railroad Company ("T&M").

13. The board of directors of MoPac which approved the aforesaid plan including six members of the MoPac board, among them the defendant Marbury, which in

1958, following a special committee study of the advisability of effecting a merger with T&P, had unanimously rejected the same on the ground stated in its 1959 annual report to stockholders that as an end-to-end merger "it would not produce the economies which are often present in a merger of parallel lines".

14. As part of the MoPac directors' now recommended plan of merger with T&P the resulting equity capital of the newly created T&M would consist solely of $25 par value common stock which issued equally to the Class A and Class B stockholders of MoPac on the basis of 4 shares of T&M for each share of Class A and Class B of MoPac and 4.8 shares of the T&M for each share of T&P common.

15. (a) The proposed plan is so grossly unfair and inequitable to MoPac's Class B stockholders, including plaintiff Alleghany, as to constitute a fraud upon these stockholders. Its consummation will deprive them of their property without due process of law to the benefit and profit of defendant Mississippi and the other Class A stockholders of MoPac, in violation of MoPac's articles of association, the laws of Missouri and the Constitutions of the United States and the State of Missouri, in that the plan allots the same number of T&M shares to each of the Class A and Class B shares, whereas the book value (as shown by the consolidated balance sheet of MoPac) of one Class B share is in excess of fifty times greater than that of one Class A share and the real and potential earnings per share of Class B is many times greater than the real and potential earnings per share of Class A.

15. (b) The effect of the modification and alteration of the relative rights and interests of the Class A and Class B stockholders of MoPac which is intended to accompany the proposed merger would be to reduce as of September 30, 1963, the equity of the holders of the MoPac Class B from some $209,803,642 to some $7,917,594 and to increase the equity of the holders of Class A stock from $184,917,600 to $368,523,721 (all as shown on a con-

solidated basis), and further, to change the Class A stock of MoPac from, as described by the Interstate Commerce Commission in its report (290 ICC 640), a "Non-Participating, Non-Cumulative, Non-Convertible" stock with a limited right in earnings and equity of the corporation into a common stock with unlimited rights in earnings and equity.

15. (c) On the basis of MoPac's consolidated net earnings of $14,330,000 available after fundings in 1962, the proposed plan, had it been in effect, would have reduced the per share earnings which were attributable to the Class B stock in 1962 from $249.48 to $7.23 and would have increased the earnings per Class A share from the maximum limit of $5 to $7.23 per share.

16. (a) The said plan has not been proposed in good faith in the interests of MoPac or the Missouri Pacific Railroad system but has been proposed at the instigation of Mississippi, the controlling and largest Class A stockholder of MoPac in conspiracy with MoPac and its directors, illegally to exercise Mississippi's majority voting strength in MoPac to promote the ends of Mississippi as the principal Class A stockholder of MoPac and in derogation by Mississippi of its fiduciary duty as MoPac's controlling stockholder and in derogation by MoPac's directors of their fiduciary duties to protect the interests of the Class B stockholders of MoPac.

16. (b) Prior to the approval by MoPac's directors of the aforesaid alteration of the relative rights and interests of the Class A and Class B stockholders of MoPac, engrafted in their proposed merger plan, Mississippi had disposed of its investment in MoPac Class B stock.

16. (c) The proposed transfer to MoPac's Class A stockholders of the present equity of its Class B stockholders is not requisite to the effectuation of a merger of T&P into MoPac.

16. (d) The proposed merger of MoPac and T&P into T&M is not requisite to the effectuation of a merger of T&P into MoPac but is a manipulative device adopted by the defendants solely for the purpose of attempting

to bring about a modification and alteration of the respective rights of the Class A and Class B stockholders solely to the financial benefit of the former and in fraud of the rights of the latter and contrary to the express provisions of the plan of reorganization of MoPac approved by the I. C. C. and this Court and contrary to the provisions incorporated in the Articles of Association of MoPac at the direction of the I. C. C. and this Court as an essential part of said plan of reorganization.

17. (a) On January 28, 1964, MoPac, T&P and T&M filed a joint application with the Interstate Commerce Commission for an order under § 5 (2) of the Interstate Commerce Act authorizing consolidation of the properties and franchises of MoPac and T&P with and into T&M, and authorizing the issuance of securities by T&M under Section 20 (a) thereof.

17. (b) In said application, the applicants MoPac and T&P state that they intend to submit the proposed merger plan to their stockholders at their respective annual meetings on May 12th and May 13th or at special meetings called prior thereto, and MoPac has advised plaintiff Alleghany that said plan will be submitted to MoPac's stockholders voting in the aggregate and not by classes. This position of MoPac is not only directly contrary to its charter but is the direct reverse of prior representations made by it to the Interstate Commerce Commission. In October, 1961, MoPac petitioned the Interstate Commerce Commission for leave to intervene in opposition to an application by Alleghany to terminate its hereinabove-referred-to voting trust agreement with Empire. In said petition MoPac stated:

> "By virtue of the terms and provisions of the Missouri Pacific Railroad Company's Articles of Association the holders of a majority of said Class B stock are given an effective veto power over . . . such things as mergers, recapitalizations. . . ."

18. (a) The submission of said plan to the stockholders of MoPac and T&P without submitting it to a separate class vote of MoPac Class B stockholders and the further pursuit of said plan before the Interstate Commerce Com-

mission will irreparably damage the Class B stockholders of MoPac and will constitute a waste of the corporate assets of MoPac.

18. (b) Should said plan be submitted to the stockholders of MoPac and T&P respectively as announced and proposed, it will be overwhelmingly approved by the Class A stockholders of MoPac, since that class, which alone stands to benefit by the proposal, has approximately 97 per cent of the voting power of MoPac's stock, and it will be similarly approved by the stockholders of T&P since some 83 per cent of its voting stock is owned by MoPac.

18. (c) The object and purpose of defendants to use Mississippi's voting control of MoPac to bring about, through the device of a merger, an alteration of the relative rights of the Class A and Class B stockholders of MoPac contrary to the provisions of its charter, and to transfer to MoPac's Class A stockholders and thereby primarily to MoPac's controlling stockholder, Mississippi, substantially all of the equity interest of MoPac's minority Class B stockholders in the corporation, present issues which lie within the jurisdiction of this Court and not within either the purview or jurisdiction of the Interstate Commerce Commission under Sections 5 and 20 (a) of the Interstate Commerce Act. Defendants' further pursuit of the proposed plan of merger before the Interstate Commerce Commission under Sections 5 and 20 (a) of the Interstate Commerce Act will constitute a waste of corporate assets of MoPac.

19. Plaintiffs have no adequate remedy at law.

Second Count.

20. Repeats the allegations contained in paragraphs 1, 2(a), 2(b), 3(a), 3(b), 3(c), 4(a), 4(b), 4(c), 4(d), 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), 7(g), 7(h), 7(i), 7(j), 8(a), 12, 14, (17(a) and 17(b).

21. MoPac has announced publicly and has also stated in its aforesaid application to the Interstate Commerce

Commission that the plan will be submitted for approval by two-thirds of all of the outstanding stock of MoPac.

22. Under the provisions of the charter of MoPac and under the law of Missouri, the relative rights of the holders of Class A and Class B stock of MoPac may not be altered except on the separate vote of the stockholders of the classes affected.

23. A vote on the proposed merger necessarily entails a vote on the alteration of the present relative rights of the Class A and Class B stockholders of MoPac.

24. If the Class B stockholders are permitted to vote separately, the proposal to change the relative rights of the Class A and Class B stockholders embodied in the proposed merger will not be approved by the Class B stockholders.

25. The calling of a meeting of MoPac's stockholders to vote on approval of the proposed merger without provision for separate votes to be cast by the Class A and Class B stockholders and any purported approval of such plan by the combined vote of the Class A and Class B stockholders would constitute a fraud upon and cause irreparable injury to the Class B stockholders and result in a waste of corporate assets of MoPac.

26. Demand upon the board of directors of MoPac to bring this action is unnecessary and would be futile because in so far as the causes of action herein set forth allege injury and threatened injury to the Class B stockholders of MoPac, said causes of action could not be asserted by MoPac or its board of directors; and to the extent that claims are herein alleged derivatively on behalf of MoPac, the action of its directors in approving and proposing the aforesaid plan, and the fact that the MoPac board is controlled by Mississippi, which has initiated and stands to benefit by said plan, demonstrate the hostility of said board to the assertion of such claims and its inability to prosecute the same effectively.

27. Plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs pray for judgment:

1. Enjoining defendants temporarily and permanently from taking any further steps for the approval or consummation of the plan;

2. Declaring that MoPac's B stockholders are entitled to vote separately and apart from the Class A stockholders on the approval of the plan;

3. Awarding plaintiffs the cost and expenses of this action, including reasonable counsel fees;

4. Granting plaintiffs such other and further relief as may be just.

FORDYCE, MAYNE, HARTMAN,
RENARD & STRIBLING,
By WALTER R. MAYNE,
G. CARROLL STRIBLING,
Attorneys for Plaintiffs,
Office and Post Office Address—
506 Olive Street,
St. Louis 1, Missouri,
GArfield 1-2660.

DONOVAN, LEISURE, NEWTON & IRVINE,
By GRANVILLE WHITTLESEY, JR.,
ROBERT M. LOEFFLER,
Of Counsel,
Office and P. O. Address,
Two Wall Street,
New York, New York.

(Exhibit A, omitted as it is same as Exhibit A attached to Complaint in Slayton case.)

Certificate of Service.

I hereby certify that I have this 25th day of February, 1964, served copies of the foregoing Amended Complaint of Alleghany Corporation upon the attorneys of record

for the parties in Cause No. 64C-48 (2), by depositing such copies in the United States Mail in St. Louis, Missouri, first-class mail, postage prepaid, addressed to them as follows:

Mr. R. H. McRoberts,
Mr. Gaylord C. Burke and
Bryan, Cave, McPheeters & McRoberts
1600 Boatmen's Bank Building
St. Louis 2, Missouri
and
Mr. John H. Hendren and
Hendren & Andrae
Central Trust Building
Jefferson City, Missouri,
Attorneys for Defendant Mississippi River Fuel Corporation,

Mr. Mark M. Hennelly,
Mr. Gilbert P. Strelinger and
Mr. Robert W. Yost
2003 Missouri Pacific Building
St. Louis 3, Missouri
and
Mr. Stuart Symington, Jr., and
Guilfoil, Caruthers, Symington & Montrey
430 Paul Brown Building
St. Louis 1, Missouri,
Attorneys for Defendant Missouri Pacific Railroad Company.

Dated February 25, 1964.

G. CARROLL STRIBLING.

Separate Motion of Defendant Missouri Pacific Railroad Company to Dismiss.

(Filed in U. S. District Court on March 23, 1964, in Alleghany case.)

Comes now defendant Missouri Pacific Railroad Company, and moves this Court to dismiss plaintiffs' Amended

Complaint as Amended. As grounds for said motion this defendant states that:

1) A portion of the relief sought by plaintiffs against this defendant relates to reasonableness or unreasonableness of a certain pleaded plan of consolidation. This Court is without jurisdiction to grant relief or in anyway try or consider the merits of the plan of consolidation or the background thereof as said matters are within the sole, exclusive, and plenary jurisdiction of the Interstate Commerce Commission (Sec. 5 of Title 49, U. S. C. A.), and further, this Court has no jurisdiction over said subject matter because plaintiffs have failed to exhaust their administrative remedies provided under Sec. 5, Title 49, U. S. C. A.

2) A portion of the relief plaintiffs seek is in the nature of a derivative suit for the benefit of this defendant, based upon the claim that the plan of consolidation is so fraudulent and without merit that its submission to the I. C. C. damages this defendant.

Said allegations fail to establish any cause of action of a derivative nature and no relief of a derivative nature is prayed, and said allegations establish on their face that any claim of a derivative nature is premature and presents no justiciable controversy.

3) The remainder of the relief sought by plaintiffs against this defendant relates to the voting rights of this defendant's stockholders in respect to the plan of consolidation referred to in plaintiffs' Amended Complaint as Amended. Plaintiffs have failed to set forth facts in their Amended Complaint as Amended stating a cause of action as to this defendant with respect to said voting rights. Plaintiffs have further failed to set forth facts in their Amended Complaint as Amended establishing their rights to the declaratory relief prayed as to their voting rights or to the voting rights of any of this defendant's stockholders. Plaintiffs' Amended Complaint as Amended, including Exhibit A attached thereto, shows on its face that the holders of the Class B stock of this defendant are not entitled to vote separately and apart

from the holders of the Class A stock of this defendant on the question of the approval of the said plan of consolidation, but to the contrary, explicitly shows that on any vote on the plan of consolidation, the vote of the holders of any proportion of either the Class A or Class B stock, as a class, is not required for the approval of such plan of consolidation.

Wherefore, Missouri Pacific Railroad Company moves this Court to enter its order dismissing plaintiffs' Amended Complaint as Amended.

Oral argument requested.

MARK M. HENNELLY,
GILBERT P. STRELINGER,
2003 Missouri Pacific Building,
St. Louis 3, Missouri,
MAin 1-1000,

GUILFOIL, CARUTHERS, SYMINGTON,
MONTREY AND DANIEL,
434 Paul Brown Building,
St. Louis 1, Missouri,
CHestnut 1-6890,

Attorneys for Defendant,
Missouri Pacific Railroad Company.

Certificate of Service.

I hereby certify that the foregoing Separate Motion of Defendant Missouri Pacific Railroad Company to Dismiss was served upon the Plaintiffs by mailing a copy to Mr. G. Carroll Stribling, 506 Olive Street, St. Louis, Missouri 63101, and on Defendant Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, James Lee Johnson and John C. Bolinger, Jr., by mailing a copy to their attorney, R. H. McRoberts, Boatmen's Bank Building, St. Louis 2, Missouri, all on this 24th day of March, 1964.

(Signed) GERALD M. SMITH.

Separate Motion of Defendants Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, James Lee Johnson, John C. Bolinger, Jr., Sam B. Cook and James M. Kemper, Jr. to Dismiss.

Filed in U. S. District Court on March 20, 1964, in Alleghany Case.

Come now the defendants Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, James Lee Johnson, John C. Bolinger, Jr., Sam B. Cook and James M. Kemper, Jr., by this their separate motion, and move the Court to dismiss the above-entitled action because the Amended Complaint, which purports to state three claims for relief, shows on its face (a) that this Court lacks jurisdiction over the subject matter of the first of such claims for relief; (b) that this Court lacks jurisdiction over the subject matter of the second of such claims for relief in that it is contingent upon the Court's prior determination of the first of such claims (over which it has no jurisdiction), that such claim is premature, and that the allegations relating to such claim fail to state a claim upon which relief can be granted; and (c) that the balance of such Amended Complaint, which purports to set forth the third claim for relief, fails to state a claim upon which relief can be granted; all as hereinafter set out with more particularity. While the allegations of the Amended Complaint are set out in two separate Counts, the purported claims for relief are, in fact, three in number as set out above.

(a) With respect to the first claim for relief:

All of the paragraphs of said Amended Complaint numbered 7 (c), (d) (e), (f), (g), 8, 9, 10, 11, 13, 14, 15, 16, 17 (a), 17 (b) (except first sentence), 18 (a), (c), 26 and paragraph numbered 1 of the prayer thereof, relate to matters pertaining to a Plan of Consolidation submitted to the Interstate Commerce Commission by the defendant Missouri Pacific Railroad Company, and others, wherein Plaintiffs seek to have this Court investigate and consider the terms, provisions and conditions of such Plan

of Consolidation, pass upon its merits, determine its fairness, justice, reasonableness, and legality, and, in general, to decide whether or not it may lawfully be submitted to the stockholders of Missouri Pacific Railroad Company and to the Interstate Commerce Commission for its consideration and approval. This Court has no jurisdiction over the subject matter of such claim for relief because the Interstate Commerce Commission has the primary, sole, exclusive and plenary jurisdiction over said Plan of Consolidation and all matters incident thereto pursuant to the provisions of Section 5 of the Interstate Commerce Act, 49 U. S. C., § 5, and Plaintiffs have a complete and adequate remedy under said Section 5 of said Interstate Commerce Act, which Plaintiffs must exhaust and have not exhausted. Accordingly, any claim for relief purported to be alleged in the above-mentioned paragraphs of said Amended Complaint must be dismissed by this Court for lack of jurisdiction over the subject matter.

(b) With respect to the second claim for relief:

The last six words of paragraph 4 (c) and all of the paragrapns of said Amended Complaint numbered 4 (d), 6, 25 and 26 relate to a purported derivative action brought by Plaintiffs on behalf of the defendant Missouri Pacific Railroad Company in connection with the said Plan of Consolidation which has been submitted to the Interstate Commerce Commission. The allegations relating to such a purported derivative action wholly fail to state any claim for relief which defendant Missouri Pacific Railroad Company has against the other defendants, and wholly fails to state a claim for relief, and the Amended Complaint does not pray for any such relief. Furthermore, as pointed out above, this Court has no jurisdiction over said Plan of Consolidation, or over any part thereof, or to pass upon the merits, fairness, reasonableness or legality thereof. Before this Court could pass upon or grant said second purported claim for relief, if one were stated, it would be necessary for this Court to first pass upon and rule adversely to the merits of said Plan of Consolidation, which it has no jurisdiction to do. Whether or not Plaintiffs have or can have any derivative cause of action such as that set forth in said second claim for relief cannot be

determined until after the Interstate Commerce Commission shall have considered and passed upon said Plan of Consolidation and the ruling of the Commission shall have been finally disposed of upon appeal to the Courts, in the manner provided by law. Then and only then can this or any Court determine whether or not Missouri Pacific Railroad Company, or any of its stockholders, has any claim for relief against Mississippi River Fuel Corporation and/or any of Missouri Pacific Railroad Company's directors. Accordingly, any claim for relief purported to be alleged in the above-mentioned paragraphs of said Amended Complaint must be dismissed by this Court for lack of jurisdiction over the subject matter, because such claim for relief is premature and because the allegations relating to such a claim fail to state any claim upon which relief can be granted.

(c) With respect to the third claim for relief:

All of the paragraphs of said Amended Complaint numbered 1, 2, 3, 4, 5, 7, 12, 17 (b) (first sentence), 18 (b), 21, 22, 23, 24, Exhibit A attached to the Amended Complaint and paragraph numbered 2 of the prayer thereof, relate to a claim for relief whereupon Plaintiffs seek the determination and decision of this Court declaring that the holders of the Class B common stock of the defendant Missouri Pacific Railroad Company are entitled to vote separately and apart from the holders of the Class A common stock of the Missouri Pacific Railroad Company on the approval of the said Plan of Consolidation which has been submitted to the Interstate Commerce Commission. Said Amended Complaint on its face, including Exhibit A attached thereto and made a part thereof, shows that the holders of said Class B common stock are not entitled to vote saparately and apart from the holders of the Class A common stock of the defendant Missouri Pacific Railroad Company on the question of the approval of said Plan of Consolidation, but, on the contrary, affirmatively shows that at any meeting of the stockholders of defendant Missouri Pacific Railroad Company called to vote upon said Plan of Consolidation the holders of the Class A and Class B common stock shall have the same voting power, and that the vote of the holders of any proportion

of either of said classes of common stock, as a class, shall not be required for the approval of such Plan of Consolidation. Accordingly, the claim for relief set out in the above numbered paragraphs must be dismissed for failure to state a claim upon which relief can be granted.

Wherefore, the said defendants pray the judgment of this Court dismissing the said three claims for relief, and each of them, as set forth above, and hence dismissing the cause or causes of action purported to be set forth in Plaintiffs' Amended Complaint.

Oral argument requested.

BRYAN, CAVE, McPHEETERS & McROBERTS,
1600 Boatmen's Bank Building,
St. Louis, Missouri 63102
By R. H. McROBERTS,
By GAYLORD C. BURKE,

HENDREN & ANDRAE,
Central Trust Building,
Jefferson City, Missouri
By JOHN H. HENDREN,

Attorneys for Defendants, Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, James Lee Johnson, John C. Bolinger, Jr.

Certificate of Service.

I hereby certify that the foregoing Separate Motion of Defendants Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, James Lee Johnson and John C. Bolinger, Jr. to Dismiss was served upon the Plaintiffs by mailing a copy to their attorney, Mr. G. Carroll Stribling, 506 Olive Street, St. Louis, Missouri 63101, and on the Defendant Missouri Pacific Railroad Company by mailing a copy to its attorney, Gilbert

P. Strelinger, 2003 Missouri Pacific Building, St. Louis, Missouri 63103, all on this 19th day of March, 1964.

MARION S. FRANCIS,
Attorney for Defendants,
Mississippi River Fuel Corporation, et al.

(Complaint in Levin Case.)

(Filed in U. S. District Court on Feb. 18, 1964, in Levin Case.)

United States District Court
For the Eastern District of Missouri,
Eastern Division.

Betty Levin, Plaintiff, —against— Mississippi River Fuel Corporation, Missouri Pacific Railroad Company, The Texas and Pacific Railway Company, Perry R. Bass, William B. Bates, Glenn W. Clark, Sam B. Cook, Robert H. Craft, T. C. Davis, Herbert Gussman, Downing B. Jenks, James Lee Johnson, James M. Kemper, Jr., William G. Marbury, Thomas F. Milbank, C. D. Peet, J. T. Suggs, Raymond V. Terry, and John C. Bolinger, Jr., Defendants.	Civil Action. 64 C 77 (1).

Plaintiff alleges on information and belief, except paragraphs 1(b), 1(c), 3, 6, 7, 8, 24, 27, and 28, which are alleged on knowledge:

First Count.

1. (a) The jurisdiction of this Court is based on diversity of citizenship.

(b) The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000 with respect to each named plaintiff.

(c) (i) Plaintiff is a citizen of the Commonwealth of Massachusetts.

(ii) Plaintiff brings this count on behalf of herself and all other persons constituting the class defined in paragraph 24 below.

(d) Defendant Mississippi River Fuel Corporation ("MRF") is a corporation incorporated under the laws of the State of Delaware, and has its principal place of business in the County of St. Louis, Missouri, in the Eastern District, Eastern Division of Missouri.

(e) Defendant Missouri Pacific Railroad Company ("MoPac") is a corporation incorporated under the laws of the State of Missouri, and has its principal place of business in St. Louis, Missouri, in the Eastern District, Eastern Division of Missouri.

(f) Defendant The Texas and Pacific Railway Company ("T & P") is a corporation incorporated on March 3, 1871, by Act of Congress of the United States, and has its principal place of business in Dallas, Texas.

(g) Defendants John C. Bolinger, Jr., Glenn W. Clark, Sam B. Cook, Downing B. Jenks, James Lee Johnson, James M. Kemper, Jr., William G. Marbury, and C. D. Peet are citizens of the State of Missouri; defendants Perry R. Bass, William B. Bates, and J. T. Suggs are citizens of the State of Texas; defendant Raymond V. Terry is a citizen of the State of Louisiana; defendant Herbert Gussman is a citizen of the State of Oklahoma; defendants Robert H. Craft, T. C. Davis, and Thomas F. Milbank are citizens of the State of New York.

2. MoPac's capital stock consists of two classes, A and B, issued and outstanding as follows:

Class A	1,849,576 shares
Class B	39,731 shares

The Class A stock is listed and traded on the New York Stock Exchange.

3. Plaintiff is now and was at the times of the transactions complained of herein the owner and holder of 85 shares of Class B stock of MoPac. Said shares were issued in exchange for 1,700 shares of MoPac old common stock in 1956 upon the reorganization of MoPac.

4. (a) The control, direction, and management of the three corporate defendants are interlocked as follows:

(i) MRF holds in excess of 1,071,895 shares of MoPac Class A stock, constituting 57.95% of the outstanding Class A shares and 56.73% of all the outstanding voting shares (Class A and Class B) of MoPac.

(ii) MoPac owns 82.86% of the single oustanding class of stock of T & P.

(iii) Defendant William G. Marbury ("Marbury") dominates and controls MRF, MoPac, and T & P. He is a director of all three corporate defendants, chairman of MRF's board of directors, chairman of MoPac's Executive Committee, and a member of T & P's executive Committee.

(iv) Defendant Downing B. Jenks ("Jenks") is a director of all three corporate defendants, president of both MoPac and T & P, and a member of the Executive Committees of both MoPac and T & P. He was selected for these posts by Marbury.

(v) Defendant Glenn W. Clark ("Clark") is a director of both MRF and MoPac, and president and a member of the Executive Committee of MRF.

(vi) Defendant Raymond V. Terry ("Terry") is a director and a member of the Executive Committees of all three corporate defendants, and a vice-president of MRF.

(vii) Defendant Thomas F. Milbank is a director of all three corporate defendants, and a member of the Executive Committee of MRF.

(viii) Defendant J. T. Suggs ("Suggs") is chairman of the boards of directors and a member of the Executive Committees of both MoPac and T & P.

(ix) Defendant Perry R. Bass is a director of both MoPac and T & P.

(x) Defendant John C. Bolinger, Jr., is a director of all three corporate defendants, and executive vice president of MRF.

(b) (i) Defendants Robert H. Craft and T. C. Davis are directors and members of the Executive Committee of MoPac.

(ii) Defendant C. D. Peet was a director of MoPac until December 4, 1963.

(iii) The individual defendants other than C. D. Peet constitute the entire present board of directors of MoPac.

(c) Neither MRF nor any of the individual defendants owns any of the Class B shares of MoPac, except that defendant T. C. Davis owns 20 such shares.

5. MoPac, MRF as majority Class A and controlling stockholder of MoPac, and the individual defendants as directors of MoPac have and are engaged in a course of conduct calculated to enrich themselves at the expense of the plaintiff and all other Class B stockholders of MoPac, in violation of said defendants' fiduciary obligations to all MoPac stockholders. By their calculated course of conduct as hereinafter described, defendants have sought and are seeking the following:

(a) unlawfully to deprive plaintiff and all other Class B stockholders of 98% of their MoPac equity, or more than $200 million, and convert it to the enrichment of MRF and other Class A stockholders of MoPac;

(b) unlawfully to increase the Class A stockholders' participation in MoPac consolidated earnings from its present absolute maximum of $9.25 million per year, to 94% of the total earnings (e. g., $23 million of the $24.6 million earnings in 1963), at the expense of the Class B stockholders;

(c) to alter and change the preferences, qualifications, and special and relative rights of the Class B stockholders without their consent, in violation of their express con-

tractual rights under the Articles of Association of MoPac, in violation of the orders of the Interstate Commerce Commission ("ICC") and of the Federal courts of this District and Circuit, and in violation of the laws of the State of Missouri;

(d) to impose a discriminatory reallocation of the corporate assets of MoPac, in favor of the Class A stockholders, so unjust and inequitable to the Class B stockholders as to constitute a fraud.

6. (a) The Class A stock of MoPac is, in substance, a non-cumulative, non-participating, 5% limited preferred stock: Each Class A share is expressly limited to non-cumulative dividends, without regard to the availability of earnings, to the extent declared but not to exceed a maximum of $5 per year, and, upon liquidation, to $100 together with any dividends declared and unpaid. The Class A stock, by express limitation, is not entitled to participate, under any circumstances, in earnings or assets beyond the foregoing specifically and expressly limited claims.

(b) (i) The Class B stock is the sole underlying equity stock of MoPac. After the Class A stock's limited, non-cumulative claims, as above described, have been met, the Class B stock is expressly entitled to everything else without restriction as to amount, including but not limited to all earnings, capital improvements, and benefits accruing from reduction of debt. The Class B stock is the only security of MoPac that is unlimited in its claims to earnings, dividends, or value.

(ii) The Class B stock not only is entitled to all residual earnings, but also enjoys priorities over the Class A stock in the application of net income. Before any dividend may be paid on the Class A stock, mandatory sinking funds and mandatory capital expenditure funds must be set aside out of income, and these funds accrue to the benefit of the Class B but not the Class A stock.

7. The preferences, qualifications, limitations, restrictions and special or relative rights of the Class A and the Class B stockholders, as described in paragraph 6 above, may not be changed without the consent of the holders

of a majority of each class separately. Article VII D of the Articles of Association of MoPac, as amended in 1956 pursuant to orders of the ICC and of this Court, provides in part as follows:

> "(3) The Company shall not, without the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding, . . . (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3)." (Article VII D of the Articles of Association of MoPac as amended in 1956, a copy of which is annexed hereto and made a part hereof as Exhibit A.)

8. (a) Except as set forth in paragraph 7 above, each Class A share and each Class B share has the same voting power, without regard to class.

(b) Thus control of MoPac inheres in the Class A stock (1,849,576 shares), which, although it is in substance a non-cumulative, non-participating, limited stock, has 98% of the combined vote, whereas the Class B stock (39,731 shares), although it is the sole equity stock, has only 2% of the combined vote.

9. MoPac is an efficiently-equipped railroad in good financial condition, with excellent prospects for the future. In every year since its reorganization in 1956, MoPac has paid in full all interest and other charges, both fixed and contingent, on all its bonds and debentures. In addition, it has anticipated the mandatory sinking fund requirements for many years to come, and has reduced its bonded indebtedness below that authorized by the ICC in 1954. MoPac's consequent prosperity redounds principally to the benefit of the Class B stock, which, with its superior relative rights, is far more valuable than the Class A stock.

10. (a) All MoPac's consolidated net earnings except those declared and paid out as dividends on the Class A stock,

accrue exclusively to the Class B stock. Thus in 1963, net earnings were $24.6 million; Class A dividends were $7.4 million ($4 per share); and the balance of $17.2 million accrued entirely to the Class B stock, i. e. at the rate of more than $430 per share. (If the full $5 dividend had been paid on the Class A stock, the balance accruing to the Class B stock would have been $15.4 million, or $390 per share.) Additional value accrued to the Class B stock in 1963 from, among other things, the application of earnings to capital expenditures, sinking funds, and the purchase of bonded indebtedness at a favorable discount.

(b) Increments similar to those described for 1963 in the value of the Class B stock have occurred, in varying but substantial amounts, in every year since MoPac's reorganization; they are cumulative; and earnings may reasonably be expected to increase in 1964 and future years.

(c) If MoPac acquires control of the Chicago & Eastern Illinois Railroad, and, through T&P, of the Kansas, Oklahoma & Gulf Railway and affiliated railroads, in accordance with the ICC examiner's recent recommendations approving the applications therefor, MoPac's earnings will increase even further, thereby further enhancing the value of the Class B stock.

(d) The book value of the Class A stock is expressly limited to $100 per share, or a total of $184,957,600 for the 1,849,576 Class A shares outstanding. According to MoPac's consolidated balance sheet for September 30, 1963, the net assets remaining after all indebtedness amounted to $394,721,242. After deducting $184,957,600 for the Class A shares, the balance of $209,763,642 is applicable entirely to the Class B shares, at the rate of $5,280 per share for the 39,731 Class B shares outstanding. Thus the equity of the 39,731 Class B shares was greater by $24.8 million than the entire claim of all the 1,849,576 Class A shares on September 30, 1963. The disparity is now even greater in favor of the Class B stock, since its equity has been further increased as a result of (among other things) current earnings, whereas the claim of the Class A stock remains permanently limited. If the underlying equity of the Class B stock were computed on intrinsic value rather than book value, the Class B stock would have a value considerably in excess of $5,280 per share.

11. (a) The present capital structure of MoPac is the outcome of 23 years of proceedings under Section 77 of the Bankruptcy Act. Various plans for the reorganization of MoPac were submitted to the ICC in 1940, 1944, and 1949, but were rejected because, *inter alia*, they all contained forfeiture provisions affecting the then-existing preferred stock and common stock of MoPac, the predecessor securities to the present Class A and Class B stock, respectively. Finally, the fourth Plan of Reorganization, submitted in 1954, abandoned any attempt at forfeiture of the then-existing preferred and common stock of MoPac, and provided, in lieu of all the old securities of the MoPac system, for the issuance by the reorganized MoPac of new fixed and contingent interest mortgage bonds of several series; debentures; and Class A (for the old preferred) and Class B (for the old common) stock.

(b) The ICC, in approving the fourth Plan of Reorganization, found that the distribution of the new non-cumulative limited Class A stock to the old preferred stockholders "would compensate them fully"; recognized that the Class B stockholders "will be entitled under the agreed plan to all residual earnings after payment of dividends on the new class A stock"; and directed that "the certificate of incorporation of the new company provide that the company shall not alter or change the rights of the holders of either class A or class B stock . . . without the consent of the holders of at least a majority . . . of each class at the time outstanding." (290 ICC 477 at 597; 600; 598.)

(c) The fourth Plan of Reorganization was approved by the ICC on July 29, 1954, approved by this Court on February 25, 1955, voted upon and accepted by the requisite security holders (including the holders of 95% of MoPac old preferred stock and 99.6% of MoPac old common stock voting thereon), confirmed by this Court on September 19, 1955, and consummated pursuant to the Consummation Order and Final Decree of this Court dated March 1, 1956.

(d) Pursuant to the authorization and direction of the ICC and the Consummation Order and Final Decree of this Court, the Articles of Association of MoPac were amended in 1956 to provide for the two classes of stock, as described in paragraphs 6, 7, and 8 above. Said Ar-

ticles of Association as so amended were then filed with and accepted by the Secretary of State of the State of Missouri,

12. (a) MRF first began to acquire MoPac Class A stock in 1959. Since that time, by purchases and by an exchange of MRF stock for MoPac Class A stock, MRF has acquired more than 1,071,895 Class A shares, constituting 57.95% of the Class A stock and 56.78% of all the shares of MoPac (Class A and Class B) entitled to vote for directors.

(b) (i) MRF intended to and did acquire control of MoPac, a common carrier by railroad operating lines of railroad in interstate commerce, without obtaining the prior approval of the ICC.

(ii) Said acquisition of control was in violation of the Interstate Commerce Act.

(iii) MRF did and does retain and exercise said control without the approval of the ICC.

(iv) Said retention and exercise of control were and are in violation of the Interstate Commerce Act.

(c) At the last MoPac stockholders' meeting for the election of directors, held in May 1963, MRF's vote alone was sufficient to elect, and effectively did elect, MRF's nominees as the entire board of directors of MoPac.

(d) The tenure in office of the individual defendants as directors of MoPac depends upon their conformance to the views of MRF, which elected them.

(e) MRF and the individual defendants have represented and are representing the interests not of all the stockholders of MoPac but only of the Class A stockholders of MoPac and more particularly the interests of MRF.

13. (a) Defendants caused the boards of directors of MoPac on December 4, 1963, and T & P on December 3, 1963, to approve a "plan" to achieve defendants' illegal purposes described in paragraph 5 above.

(b) The plan provides that MoPac and its subsidiary T & P would be consolidated with a newly-organized Dela-

ware corporation known as Texas & Missouri Pacific Railroad Company ("T & MP"), the latter to be the surviving corporation. The consolidation would be accomplished by exchanges of stock as follows:

(i) Each Class A share of MoPac would be exchanged for four shares of T & MP common stock.

(ii) Each Class B share of MoPac would likewise be exchanged, as if it were identical with each Class A share, for four shares of T & MP common stock.

(iii) Each publicly-held share of T & P stock (i. e. 17.14%) would be exchanged for 4.8 shares of T & MP common stock.

14. (a) The exchanges of stock described in paragraph 13 (b) above unlawfully ignore the vast differences between the Class A and the Class B shares expressly stipulated by the Articles of Association, as described in paragraphs 6 through 10 above, and instead treat the two classes as though the Articles of Association made no distinction between them.

(b) Such exchanges would accomplish for the defendants their illegal purposes, as follows:

(i) The Class A stockholders would seize more than $192 million of the Class B stockholders' vested equity in MoPac. MRF, holding 57.95% of the Class A stock, would itself appropriate $110 million thereof.

(ii) The Class A stock would be converted from a non-cumulative, non-participating stock, with limited claims to dividends and equity of MoPac, into a fully-participating, unlimited common stock of MoPac's successor, at the expense of the Class B stock of MoPac.

15. (a) The defendants have publicly stated that the plan does not require the separate approval of the holders of a majority of each class of MoPac stock, A and B, and that the defendants intend to submit the plan for approval at a MoPac stockholders' meeting without requiring the separate approval of the holders of a majority of each class of stock.

(b) Thus MRF in effect asserts that it could, practically singlehandedly (or with the addition of a relatively small

amount of Class A stock), deprive the Class B stockholders of their rights and preferences that were so carefully insured by the parties to MoPac's reorganization, by the ICC, and by this Court after decades of litigation.

(c) The directors of both MoPac and T & P directed that the plan be submitted to their stockholders for approval at stockholders' meetings on or before May 12, 1964, for MoPac and May 13, 1964, for T & P.

(d) On January 28, 1964, defendants caused the plan to be filed with the ICC for approval.

16. The plan, if effected, would necessarily alter and change the preferences, qualifications, limitations, restrictions and special and relative rights of the Class A and Class B stockholders of MoPac in the respects, among others, set forth in paragraph 14 above. Accordingly, under the provisions of Article VII D (3) of the Articles of Association of MoPac as amended pursuant to the orders of the ICC and of this Court as aforesaid, and pursuant to the laws of the State of Missouri, the plan can not be adopted by the stockholders of MoPac without the approval of the holders of a majority of each Class of stock.

17. (a) The plan would not and could not be approved if submitted to the stockholders of MoPac in a bona fide election in accordance with the requirements of said Article VII D (3).

(b) Alleghany Corporation, Maryland corporation, and Empire Trust Company, a New York banking corporation, are the beneficial owner and the voting trustee, respectively, of about 20,500 shares, or more than 51%, of the outstanding Class B stock of MoPac.

(c) Alleghany Corporation and Empire Trust Company have publicly announced their opposition to the plan, and have brought an action now pending in this Court (Civil Action No. 64 C 48 (2)) seeking *inter alia*, to enjoin the defendants from taking any further steps for the approval or consummation of the plan.

18. (a) The plan is not intended to, nor would it if effected, serve any valid business purpose.

(b) A merger of MoPac and T & P was unanimously rejected as economically undesirable by the boards of directors of both railroads in 1958, after long and careful study. Among the directors of MoPac at that time were defendants Marbury, Robert H. Craft, T. C. Davis, James Lee Johnson, William B. Bates, and Herbert Gussman. Since 1958, many steps have been taken further to combine and centralize the operations of MoPac and T & P.

(c) The plan is in fact a fraud and a part of defendants' course of conduct calculated to achieve their illegal purposes as aforesaid.

(d) The plan, if effected, would impair the stability of and public confidence in railroad securities, in contravention of the policy and intent of the Congress of the United States as expressed in the Interstate Commerce Act, and of rulings of the ICC.

(e) The plan, if effected, would result in a confiscation contrary to law and the policy of the Congress of the United States and of the ICC.

19. (a) The defendants, at the times they devised the plan and caused it to be approved by the boards of directors of MoPac and T & P and made the statements referred to in paragraph 15 above, knew or should have known the facts set forth in paragraphs 16, 17 (a) and (b), and 18 above.

(b) (i) The defendants, at the times they devised and announced the plan and its proposed method of approval, knew that the plan could not be approved without the consent of the holders of a majority of the Class B stock.

(ii) MoPac formally represented to the ICC, in proceedings in 1961, that the MoPac Class B stock is a "strategic" issue that "exercises veto power over matters and decisions of vast moment to the Missouri Pacific Railroad Company." Further, MoPac then formally represented in those proceedings that among the "many vital and import corporate actions" on which "the holders of a majority of said Class B stock are given an effective veto power" and on which the vote of said majority is necessary are, specifically, "such things as mergers [and] recapitalizations".

(iii) Said formal representations were made by MoPac to the ICC at a time when MRF had already acquired over 25% of the MoPac Class A stock, and when Marbury had already become chairman of the Executive Committee of MoPac.

(iv) Neither MoPac's Articles of Association nor the applicable law has been changed since MoPac made said representations to the ICC in 1961, as the defendants know.

(v) MRF's and MoPac's present contrary assertions (i. e., that the consent of the holders of a majority of the Class B stock is **not** a prerequisite to approval of the proposed plan of consolidation) in this Court and before the ICC constitute a fraudulent abuse of legal and administrative process.

20. (a) The plan and its method of approval as proposed by the defendants violate provisions of the orders of the ICC, of this Court, and of the Articles of Association of MoPac prohibiting any change in the rights of the holders of either class, A or B, of MoPac stock without the consent of the holders of a majority of each class, and violate the laws of the State of Missouri and the contractual rights of the plaintiff and all other Class B stockholders.

(b) the acts complained of in paragraphs 5, 12, 13, 15 and 22 hereof have depressed the value of the Class B stock and severely injured the plaintiff and all other Class B stockholders of MoPac.

21. Any further steps or conduct by any of the defendants to effectuate the plan would cause irreparable injury to plaintiff and all other Class B stockholders of MoPac.

22. Defendants have repeatedly attempted to injure and have injured plaintiff and all other Class B stockholders of MoPac, by causing the issuance of misleading financial reports and public statements designed to depress the value of the Class B stock.

23. Plaintiff has no adequate remedy at law.

24. This count is brought on behalf of plaintiff and all persons similarly situated, namely, all persons who are, and were at the time of the acts complained of herein, owners of any Class B stock of MoPac.

25. There are about 1,200 persons constituting the class described in paragraph 24 above, and they are so numerous as to make it impracticable to bring them all before this Court.

26. Common questions of law and fact affect the rights of each member of the class, and common equitable relief is sought.

27. Plaintiff will fairly insure the adequate representation of all members of the class. Plaintiff can, and undertakes that she will, represent the entire class.

28. This action is not brought collusively to confer upon this Court jurisdiction that it would not otherwise have.

Second Count.

29. All of the First Count is incorporated herein by reference.

30. Since 1959 and continuously to date, defendants have conspired, combined, and agreed with one another.

(a) to enable MRF to acquire and exercise control of MoPac without obtaining the prior approval of the ICC, in violation of the Interstate Commerce Act;

(b) to facilitate the acquisition by MRF of increasing quantities of MoPac Class A stock, by a course of conduct in violation of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Rules and Regulations of the Securities and Exchange Commission ("SEC") and the New York Stock Exchange; and

(c) thereafter to enrich MRF by confiscating and unlawfully appropriating to MRF, as the principal holder of MoPac Class A stock, the equity and earnings of MoPac belonging to and vested in the plaintiff and all other Class B stockholders of MoPac.

31. As part and in furtherance of said conspiracy, in addition to the acts and transactions complained of in paragraphs 5, 12, 13, 15, and 22 above, the defendants did and do commit and engage in the acts and transactions hereinafter set forth.

32. Commencing with the year 1959, MRF, under the exercised control, direction, and management of Marbury, began acquiring MoPac Class A stock.

33. (a) By the end of 1961, MRF had acquired 605,700 MoPac Class A shares, representing 31% of the combined voting shares of MoPac.

(b) Nevertheless, during that three-year period of acquisition (1959-1961), MRF and Marbury repeatedly issued public statements disclaiming control and intent to obtain control of MoPac.

(c) Said disclaimers of control and intent to obtain control of MoPac were false, and were known by MRF and Marbury to be false when issued.

34. MRF intended to and did acquire control of MoPac, a common carrier by railroad operating lines of railroad in interstate commerce, without obtaining the prior approval of the ICC, and MRF did and does retain and exercise such control without the approval of the ICC, all in violation of the Interstate Commerce Act.

35. By mid-1962, MRF had acquired a total of 661,000 MoPac Class A shares, representing 35% of the combined voting shares of MoPac.

36. To enable MRF to obtain additional Class A stock of MoPac without any further cash investment, and further to enrich themselves at the expense of the Class B stockholders, defendants, in or about the summer of 1962, devised a scheme whereby MRF would offer to exchange 1,200,000 shares of MRF common stock for 900,000 shares of MoPac Class A stock (the "Exchange Offer").

37. During the three-month period prior to the first public announcement by MRF of the Exchange Offer, MRF purchased, in the open market, substantial amounts

of its own (MRF) common stock, with the intent and effect of artificially raising its stock market price so as to establish a ratio of exchange for the impending Exchange Offer that would be most favorable to MRF and would thus enable MRF to acquire the largest number of MoPac Class A shares for the smallest number of MRF common shares.

38. MRF common stock and MoPac Class A stock are now, and were at the times of the acts and transactions complained of herein, traded on the New York Stock Exchange.

39. As a result of the aforesaid manipulation of the stock market prices of MRF common stock, the Exchange Offer ratio of four shares of MRF common stock for three shares of MoPac Class A stock (the 4-to-3 ratio) was substantially the same as the ratio of the closing prices of the two stocks on the New York Stock Exchange at the time the Exchange Offer was made.

40. After the Exchange Offer was closed and MRF had acquired 321,795 shares of MoPac Class A stock under the Exchange Offer, the 4-to-3 ratio began to widen in favor of the MoPac Class A stock, and by January 1964, the average price of MoPac Class A stock was approximately double the average price of MRF common stock.

41. In connection with the Exchange Offer and in furtherance of their said conspiracy, defendants made and published or caused to be made and published the following (sometimes hereinafter collectively called the "Published Statements"):

(a) a Registration Statement and Prospectus, filed by MRF with the SEC, that became effective on or about October 18, 1962. Marbury, Clark, and Terry, as directors and officers of MRF, and MRF, as registrant, signed the Registration Statement;

(b) a letter from MRF to the MoPac Class A stockholders, dated October 18, 1962, signed by Marbury and Clark as Chairman of the Board and President, respectively, of MRF, enclosing the Prospectus and urging the Class A

stockholders to exchange their stock for MRF stock under the Exchange Offer ("MRF Letter"). At that time, as now, Marbury was also chairman of the Executive Committee and Clark was also a director of MoPac;

(c) a letter from MoPac to the MoPac Class A stockholders, dated October 15, 1962, signed by Jenks as President of MoPac, stating that the MoPac board of directors "considers that the favorable aspects of the [Exchange] offer are worthy of serious consideration by the [Class A] shareholders" ("MoPac Letter").

42. The Published Statements contained statements misleading with respect to material facts, and omitted to state material facts required to be stated therein, or necessary to be stated in order to make the statements therein, in the light of the circumstances under which they were made, not misleading, as set forth hereinafter, in violation of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Rules and Regulations of the SEC and of the New York Stock Exchange, thereby depriving the MoPac Class A stockholders of the information necessary to make an informed appraisal of the Exchange Offer.

43. The Prospectus and the MRF Letter were deliberately written to, and did, convey the misleading and erroneous impression that MRF's natural gas business was thriving, profitable, and growing, and that MRF's offer to exchange four of its shares for three MoPac Class A shares was generous in view of the strength and potential of MRF's business.

44. At the times the Published Statements were made, published, and circulated among the MoPac Class A stockholders, MRF's natural gas business had in fact exhausted its potential, and there was no long-term growth or future in it for investors, as Marbury was fully aware at such times, and as he publicly admitted several months later. Indeed, not many months after the Exchange Offer was closed, Marbury and four other directors of both MRF and MoPac—Jenks, Clark, Terry, and Thomas F. Milbank—sold more than 80,000 of their 96,000 shares of MRF common stock. Many of those shares were acquired by those directors under stock options granted by MRF, and were

then resold to MRF at substantially higher prices, resulting in huge profits for those directors.

45. The MoPac Letter was deliberately written to, and did, convey the misleading and erroneous impression that the directors of MoPac believed that the Exchange Offer was favorable to the Class A stockholders of MoPac.

46. (a) Four directors of MoPac at the time the Exchange Offer was made, who owned more than 24,000 shares of MoPac Class A stock, intended not to accept, and did not accept, the Exchange Offer.

(b) Said intention and non-acceptance were material facts known to MoPac and Jenks when the MoPac Letter was sent to MoPac Class A stockholders, and during the entire time that the Exchange Offer was open.

(c) No statement of said intention or non-acceptance was ever communicated to the MoPac Class A stockholders by any of the defendants while the Exchange Offer was open.

(d) The failure to include any statement of said intention and non-acceptance in the Published Statements was an omission that rendered the Published Statements materially misleading.

47. The Published Statements were distributed through the use of the mails, the instrumentalities of interstate commerce, and/or the facilities of the New York Stock Exchange, a national securities exchange.

48. The Published Statements and the aforesaid manipulation of the stock market prices of MRF common stock induced MoPac Class A stockholders to exchange, and enabled MRF to acquire, a total of 321,795 MoPac Class A shares for inadequate consideration.

49. MRF acquired said 321,795 MoPac Class A shares through violation of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Rules and Regulations of the SEC and of the New York Stock Exchange.

50. Having acquired more than 1,071,895 shares of MoPac Class A stock by means of the conspiracy as aforesaid, MRF then sought and now seeks to impose upon

the Class B stockholders of MoPac the plan of consolidation described in paragraph 13 above, for the purpose of seizing and appropriating to MRF, as principal Class A and controlling stockholder of MoPac, most of the earnings and assets of MoPac, which belong to and are vested in the Class B stockholders of MoPac.

51. Plaintiff and all other Class B stockholders of MoPac have been and are being severely damaged by the acts and transactions, including the conspiracy, complained of herein.

52. Plaintiff and the other MoPac Class B stockholders have no adequate remedy at law against the continued abuse by MRF and the individual defendants of their control of MoPac, and their exercise of such control through the directors of MoPac, to the harm of plaintiff and all other Class B stockholders of MoPac.

Third Count.

53. All of the First and Second Counts, except paragraphs 1 (c) (ii), 24 through 27, and 29, is incorporated herein by reference.

54. Plaintiff brings this count derivatively on behalf of MoPac.

55. MRF and the individual defendants have caused and are attempting to cause MoPac to engage in a course of conduct which is unlawful in that, among other things, such conduct

(a) violates the express and unambiguous provisions of the Articles of Association of MoPac;

(b) violates the aforesaid orders of the ICC and the District Court;

(c) is unlawfully designed to enrich MRF and the other holders of the Class A stock at the expense and to the detriment of the holders of the Class B stock of MoPac;

(d) seeks to effect a consolidation of T & P with MoPac and T & MP, in violation of the Act of Congress incorporating T & P;

(e) violates the laws of the State of Missouri; and

(f) violates the Securities Exchange Act of 1934 and the Rules and Regulations of the SEC and of the New York Stock Exchange, by causing a false proxy statement to be made and published as follows:

(i) MRF and the individual defendants caused MoPac to make, publish, and mail to the stockholders of MoPac a proxy statement dated April 15, 1963, soliciting proxies for the election of MRF's nominees as directors of MoPac.

(ii) As Marbury knew when said proxy statement was made, published, and mailed on or about April 15, 1963, it was materially false, in that it stated that Marbury owned 40,046 shares of MRF common stock as of March 13, 1963.

(iii) In fact, Marbury owned only 46 shares of MRF common stock as of March 13, 1963, having sold 40,000 shares of MRF common stock on or about March 11 and 12, 1963, more than one month before the date of the proxy statement.

56. By such unlawful conduct, MRF and the individual defendants have breached their respective fiduciary duties owing to MoPac.

57. Such unlawful conduct did, does, and will constitute a waste of the corporate assets of MoPac, in that such conduct did, does, and will cause MoPac to incur, *inter alia*, the following substantial, unnecessary, and unwarranted expenses:

(a) the expense of preparing, issuing, and filing a registration statement, prospectus, and proxy statement in connection with the plan of consolidation described in paragraph 13 above;

(b) the expense of incorporating and maintaining T & MP;

(c) the expense of holding a stockholders' meeting at which a vote on said plan of consolidation will be conducted in a manner that violates the express provisions of the Articles of Association of MoPac and the laws of the State of Missouri;

(d) the expense of proceedings before the Interstate Commerce Commission with respect to said plan of consolidation;

(e) the expense of defending actions which have been and may be instituted by the holders of MoPac Class B stock to prevent the attempted destruction of valuable rights of the Class B stockholders;

(f) the expense of defending actions resulting from the issuance of false proxy statements.

58. Demand upon the board of directors of MoPac to bring this count of this action is unnecessary and would be futile, because the individual defendants who engaged in the acts, transactions, and conduct complained of herein comprise the entire board of directors of MoPac.

Wherefore, plaintiff demands judgment that:

(1) This Court declare that the proposed plan of consolidation described in paragraph 13 hereof may not be adopted or implemented by MoPac without securing the approval of the holders of a majority of the outstanding shares of Class B stock of MoPac;

(2) Defendants be enjoined from taking any steps to effectuate or consummate said plan of consolidation;

(3) MRF be required to divest itself of ownership of sufficient MoPac Class A stock so that MRF will no longer be in control of MoPac;

(4) Until said divestiture, this Court appoint a trustee for all the MoPac Class A stock owned by MRF;

(5) MRF and the individual defendants be prohibited from taking any steps in exercise of control of MoPac;

(6) MRF and the individual defendants account to MoPac and to plaintiff and the other Class B stockholders of MoPac (a) for the damages sustained by MoPac and by plaintiff and the other Class B stockholders of MoPac, and (b) for the profits derived by MRF and the individual defendants;

(7) Plaintiff be awarded the costs and expenses of this action, including reasonable counsel fees; and

(8) Plaintiff be granted such other and further relief as may be just.

STEIN and SEIGEL,
By HYMAN G. STEIN,
CHAS. SEIGEL,
Attorneys for Plaintiff,
Office and Post Office Address:
722 Chestnut Street,
St. Louis 1, Missouri,
CEntral 1-1911.

SHERIN & LODGEN,
Office and Post Office Address:
80 Federal Street,
Boston 10, Massachusetts,
HA 6-5720,
and

SZOLD, BRANDWEN, MEYERS,
BLUMBERG & ALTMAN,
Office and Post Office Address:
30 Broad Street,
New York, N. Y. 10004,
HA 2-1777,
and

JOHN LOWENTHAL, Esq.,
Office and Post Office Address:
521 Fifth Avenue,
New York, N. Y. 10017,
MO 1-2480,
Of Counsel.

(Exhibit A, omitted as it is same as Exhibit A attached to Complaint in Slayton case.)

Commonwealth of Massachusetts, } ss.
County of Middlesex, }

Betty Levin, being duly sworn, deposes and says that she is the Plaintiff in the within action; that she has read the foregoing complaint and knows the contents thereof; that the same is true to her own knowledge, except as to

the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

BETTY LEVIN,

Sworn to before me February 18, 1964.

ALVIN LEVIN,
Notary Public.

My commission expires October 20, 1967.

Separate Motion of Defendants Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, Downing B. Jenks, James Lee Johnson, C. D. Peet, John C. Bolinger, Jr., Sam B. Cook and James M. Kemper, Jr., to Dismiss.

(Filed in U. S. District Court on March 20, 1964, in Levin case.)

Come now the defendants Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, Downing B. Jenks, James Lee Johnson, C. D. Peet, John C. Bolinger, Jr., Sam B. Cook and James M. Kemper, Jr., by this their separate motion, and move the Court to dismiss the above-entitled action because the Complaint, which purports to state four claims for relief, shows on its face (a) that this Court lacks jurisdiction over the subject matter of the first of such claims for relief; (b) that this Court lacks jurisdiction over the subject matter of the second of such claims for relief in that it is contingent upon the Court's prior determination of the first of such claims (over which it has no jurisdiction), that such claim is premature, and that the allegations relating to such claim fail to state a claim upon which relief can be granted; and that the balance of such Complaint, which purports to set forth the third and fourth claims for relief (c) and (d), fails to state any claim upon which relief can be granted; all as hereinafter set out with more particularity. While the allegations of the Complaint are set out in three separate Counts, the purported claims for relief are, in fact, four in number as set out above.

(a) With respect to the first claim for relief:

All of the paragraphs of said Complaint numbered 4 (a) (i), 4 (a) (ii), 5, 6, 9, 10, 11, 12, 14, 15 (b), (d), 17 (c), 18, 19, 20, 21, 22, 30 (a), 34 and paragraphs numbered (2), (3), (4) and (5) of the prayer thereof, relate to matters pertaining to a Plan of Consolidation submitted to the Interstate Commerce Commission by the defendant Missouri Pacific Railroad Company, and others, wherein Plaintiff seeks to have this Court investigate and consider the terms, provisions and conditions of such Plan of Consolidation, pass upon its merits, determine its fairness, justice, reasonableness, and legality, and, in general, to decide whether or not it may lawfully be submittted to the stockholders of Missouri Pacific Railroad Company and to the Interstate Commerce Commission for its consideration and approval. This Court has no jurisdiction over the subject matter of such claim for relief, because the Interstate Commerce Commission has the primary, sole, exclusive and plenary jurisdiction over said Plan of Consolidation and all matters incident thereto pursuant to the provisions of Section 5 of the Interstate Commerce Act, 49 U. S. C., § 5, and Plaintiff has a complete and adequate remedy under said Section 5 of said Interstate Commerce Act, which Plaintiff must exhaust and has not exhausted. Accordingly, any claim for relief purported to be alleged in the above-mentioned paragraphs of said Complaint will be dismissed by this Court for lack of jurisdiction over the subject matter.

(b) With respect to the second claim for relief:

All of the paragraphs of said Complaint numbered 4 (a), 4 (a) (iii) through 4 (a) (x), inclusive, 4 (b), (c), 28, 54, 55, 56, 57, 58 and paragraph numbered 6 of the prayer thereof, relate to a purported derivative action brought by Plaintiff on behalf of the defendant Missouri Pacific Railroad Company in connection with the said Plan of Consolidation which has been submitted to the Interstate Commerce Commission. The allegations relating to such a purported derivative action wholly fail to state any claim for relief which defendant Missouri Pacific Railroad Company has against the other defendants, and wholly fails

to state a claim for relief. Furthermore, as pointed out above, this Court has no jurisdiction over said Plan of Consolidation, or over any part thereof, or to pass upon the merits, fairness, reasonableness or legality thereof. Before this Court could pass upon or grant said second purported claim for relief, if one were stated, it would be necessary for this Court to first pass upon and rule adversely to the merits of said Plan of Consolidation, which it has no jurisdiction to do. Whether or not Plaintiff has or can have any derivative cause of action such as that set forth in said second claim for relief cannot be determined until after the Interstate Commerce Commission shall have considered and passed upon said Plan of Consolidation and the ruling of the Commission shall have been finally disposed of upon appeal to the Courts, in the manner provided by law. Then and only then can this or any Court determine whether or not Missouri Pacific Railroad Company, or any of its stockholders, has any claim for relief against Mississippi River Fuel Corporation and/or any of Missouri Pacific Railroad Company's directors. Accordingly, any claim for relief purported to be alleged in the above-mentioned paragraphs of said Complaint must be dismissed by this Court for lack of jurisdiction over the subject matter, because such claim for relief is premature and because the allegations relating to such a claim fail to state any claim upon which relief can be granted.

(c) With respect to the third claim for relief:

All of the paragraphs of said Complaint numbered 1, 2, 3, 7, 8, 13, 15 (a), (c), 16, 17 (a), (b), 24, 25, 26, 27 and paragraph numbered 1 of the prayer thereof, relate to a claim for relief whereupon Plaintiff seeks the determination and decision of this Court declaring that the holders of the Class B common stock of the defendant Missouri Pacific Railroad Company are entitled to vote separately and apart from the holders of the Class A common stock of the Missouri Pacific Railroad Company on the approval of the said Plan of Consolidation which has been submitted to the Interstate Commerce Commission. Said Complaint on its face, including Exhibit A attached thereto and made a part thereof, shows that the holders of said Class B

common stock are not entitled to vote separately and apart from the holders of the Class A common stock of the defendant Missouri Pacific Railroad Company on the question of the approval of said plan of Consolidation, but, on the contrary, affirmatively shows that at any meeting of the stockholders of defendant Missouri Pacific Railroad Company called to vote upon said Plan of Consolidation the holders of the Class A and Class B common stock shall have the same voting power, and that the vote of the holders of any proportion of either of said classes of common stock, as a class, shall not be required for the approval of such Plan of Consolidation. Accordingly, the claim for relief set out in the above numbered paragraphs must be dismissed for failure to state a claim upon which relief can be granted.

(d) With respect to the fourth claim for relief:

All of the paragraphs of said Complaint contained in the Second Count thereof except paragraphs 30 (a) and 34 relate to a purported claim for relief arising out of alleged violations of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Rules and Regulations of the Securities and Exchange Commission and the New York Stock Exchange. All of the allegations in said Count contained relate to the acquisition of control of the defendant Missouri Pacific Railroad Company by the defendant Mississippi River Fuel Corporation through the purchase of the Class A common stock of the Missouri Pacific Railroad Company. Said allegations wholly fail to show that Plaintiff, individually, or as the representative of the holders of the Class B stock of Missouri Pacific Railroad Company, or the Class B stockholders as a class, has, or can have, any claim for relief or has suffered or can suffer any damage arising out of the purchase and sale of the Class A common stock, and wholly fail to show that the Plaintiff ever bought, sold or held any of said Class A common stock of Missouri Pacific Railroad Company or stock of Mississippi River Fuel Corporation issued in exchange therefor. Accordingly, the purported claim for relief set out in the above-mentioned Count Two must be dismissed for failure to state a claim upon which relief can be granted.

Wherefore, the said defendants pray the judgment of this Court dismissing the said four claims for relief, and each of them, as set forth above, and dismissing the cause or causes of action purported to be set forth in Plaintiff's Complaint.

Oral argument requested.

BRYAN, CAVE, McPHEETERS & McROBERTS,
1600 Boatmen's Bank Building,
St. Louis, Missouri 63102,
By R. H. McROBERTS,
By GAYLORD C. BURKE,

HENDREN & ANDRAE,
Central Trust Building,
Jefferson City, Missouri,
By JOHN H. HENDREN,

Attorneys for Defendants,
Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, Downing B. Jenks, James Lee Johnson, C. D. Peet, John C. Bolinger, Jr.

Certificate of Service.

I hereby certify that the foregoing Separate Motion of Defendants Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, Downing B. Jenks, James Lee Johnson, C. D. Peet and John C. Bolinger, Jr. to Dismiss was served upon the Plaintiff by mailing a copy to her attorney, Mr. Roberts P. Elam, 319 North 4th Street, St. Louis, Missouri 63102, and on the Defendant Missouri Pacific Railroad Company by mailing a copy to its attorney, Gilbert P. Strelinger, 2003 Missouri Pacific Building, St. Louis, Missouri 63103, all on this 19th day of March, 1964.

MARION S. FRANCIS,
Attorney for Defendants,
Mississippi River Fuel Corporation, et al.

(Order of U. S. District Court Consolidating Slayton, Alleghany and Levin Cases for Purposes of Hearing Motions.)

(Filed in U. S. District Court on March 13, 1964.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

Rose Slayton, et al.,
Plaintiffs,
vs.
Mississippi River Fuel Corporation, Missouri Pacific Railroad Company, et al.,
Defendants.
No. 63 C 436 (2)

Alleghany Corporation and Empire Trust Company,
Plaintiffs,
vs.
Mississippi River Fuel Corporation, Missouri Pacific Railroad Company, et al.,
Defendants.
No. 64 C 48 (2)

Betty Levin,
Plaintiff,
vs.
Mississippi River Fuel Corporation, Missouri Pacific Railroad Company, et al.,
Defendants.
No. 64 C 77 (2)

Pursuant to a pre-trial conference with all of the attorneys for the plaintiffs and the defendants in the above-captioned cases, the Court finds that there is agreement of all parties with respect to a limited consolidation of the above cases for trial. There is also a motion pending in

Cause No. 63 C 436 filed by the defendant Missouri Pacific Railroad to dismiss. This motion was set for hearing on March 27, 1964. In view of the fact that similar motions will be filed in the other two cases, the hearing on the motion to dismiss is postponed from March 27, 1964, to April 10, 1964, at 9:00 a. m., when it will be heard for all three causes.

The defendants do not object to the consolidation of the three causes of action for the purpose of pre-trial discovery, the hearing of motions, but they desire to reserve the right to file separate motions in any of the causes as circumstances may dictate. Accordingly,

It Is Hereby Ordered that cause No. 64 C 77(1) be transferred from Division One to Division Two and that the three causes of action: 64 C 77, 64 C 48 and 63 C 436 be and the same are hereby consolidated for the limited purpose of hearing of motions, pre-trial discovery and other preliminary matters before the Court. Defendants in these causes, however, shall have the right to file separate motions as they may determine in any of the three causes.

It Is Further Ordered that the hearing on the motion of defendant Missouri Pacific to dismiss, set for March 27, 1964, is continued to April 10, 1964, at 9:00 a. m., at which time the motion will be heard as to all three causes of action.

Dated this 13th day of March, 1964.

JAMES H. MEREDITH,
United States District Judge.

Matters outside the pleadings presented to and not excluded by the Court below:

(a) Excerpts from the transcript of hearing on motions to dismiss.

United States District Court,
Eastern District of Missouri,
Eastern Division.

Rose Slayton, et al.,
Plaintiff,
vs.
Missouri Pacific Railroad Company, et al.,
Defendants.
No. 63 C 436 (2).

Alleghany Corporation, et al.,
Plaintiff,
vs.
Missouri Pacific Railroad Company, et al.,
Defendants.
No. 64 C 48 (2).

Betty Levin,
Plaintiff,
vs.
Mississippi River Fuel Corporation, et al.,
Defendants.
No. 64 C 77 (2).

St. Louis, Missouri
April 10, 1964

Hearing on Motions to Dismiss.

Transcript of proceedings had during hearing on Motions to Dismiss in above styled causes before

Honorable James H. Meredith,

Judge of the District Court of the United States, Eastern District of Missouri, Eastern Division, presiding in Court No. 2 thereof.

Appearances:

Messrs. Harold C. Ackert and Abraham L. Pomerantz, attorneys for Plaintiffs Rose Slayton, et al.

Messrs. G. Carroll Stribling, Granville Whittlesey and Robert M. Loeffler, attorneys for Plaintiffs Alleghany Corporations, et al.

Messrs. Roberts P. Elam and John Lowenthal, attorneys for Plaintiff Betty Levin.

Mr. R. H. McRoberts, attorney for defendants Mississippi River Fuel Corporation, et al.

Mr. Thomas J. Guilfoil, attorney for defendants Missouri Pacific Railroad Company, et al.

The Court: Gentlemen, are you ready with Slayton, Alleghany and Levin vs. Missouri Pacific, the motions? (Tr. p. 2).

Mr. McRoberts: . . .

Right here before going into the language of the Articles of Association, there is one point I want to take up. In the Alleghany petition and in the Levin petition they inject into this lawsuit something which I think is evidence. They quote from a statement made by Missouri Pacific in a proceeding before the Interstate Commerce Commission in 1961, and they say Missouri Pacific by that admitted that the B stock had the veto over any merger. Obviously, whatever Missouri Pacific may have said or may not have said, it is not binding upon Mississippi or binding upon this Court, but they did not put in the entire story about the proceedings and I think counsel for the Missouri Pacific will probably want to put that in. If he doesn't, I would like to do it in reply, but if we are going to talk about positions heretofore taken by the parties, I would like to direct Your Honor's attention to the position which Alleghany has taken. It is utterly inconsistent with the position it is now taking in its complaint and brief in this case. One, a position it took in this very Court in the reorganizations, the reorganization of the Missouri Pacific when it was seeking to get this very Class B stock.

If Your Honor will look back in the old files of the Missouri Pacific reorganization, you will find that when it was proposed to issue B stock some of the parties objected to it, and particularly one group known as the group of institutional investors which represented some of the large institutional security holders and which happened to be represented by the firm of Cadwalalder, Wickersham and Taft. This is what they said in objection to this issuance of B stock, half of which approximately would go to Alleghany. "After the postponement of the exercise of the rights of creditors for more than twenty-one years, the Commission in an attitude of hopelessness adopted the unsound agreed system plan made between creditors and the stockholders. When this agreement was reached, these proceedings had come to a state of almost complete frustration. In such circumstances the stockholders had a bargaining power entirely disproportionate to their interest in the property. The agreed system plan, in its treatment of the first and refunding bond holders and the common stockholders of the Missouri Pacific, reflects this bargaining power. Section 77 conferred broad powers on the Commission to prevent the consummation of plans of reorganization of the kind now before the Court. The proposed new Class B stock, although only a small fraction of the new capitalization carries voting rights. It also carries rights of veto which will enable its owners to pry further concessions from other security holders." No—and here are the two things—"No new equity capital or debt capital convertible into equity capital may be obtained without the permission of the owners of this minuscule voting interest. Thus is nuisance value recognized and preserved."

This is what Alleghany said in a brief filed in this Court at that time seeking to get this B stock and answering this charge: "The group's brief then states that the Class B stock 'carries rights of veto which will enable its owners to pry further concessions from other security holders.' Except in the unlikely event that the new company attempts to raise new equity capital or debt capital convertible into equity capital both of which appear to be impracticable for railroad companies, there would appear to be no veto at all." In other words, Alleghany was

saying that except for the issuance of new stock securities or for the issuance of debt securities convertible into stock securities, this B stock will carry no veto power at all. That is the position that Alleghany took at that time.

Then following this proceeding before the I. C. C., where the statements were made by Missouri Pacific that is quoted in the complaints and the briefs really go to town on that point, Alleghany said this to its stockholders in its statement, its annual report for 1961 issued in the spring of '62, about two years ago, after reviewing Alleghany's investment in the Missouri Pacific and describing the rights of the B stock and the possibilities which it offered and what voting power they had on the issuance of new securities, they said this: "The vote of Alleghany's Missouri Pacific Class B stock is necessary to any merger, consolidation or other type of amalgamation." But they didn't stop there; the position that they are taking here is just what I have read, but they added these qualifying words: "Requiring the issuance of additional Missouri Pacific shares." In other words, they then interpreted to their stockholders the provisions of the Articles of Association which Your Honor is going to be called upon to interpret. They interpreted them as giving them the veto power only on a merger in which the Missouri Pacific is the surviving corporation and issues its securities because that would come within the literal language; but any other merger, no.

So much for past positions, the past position of Alleghany and the past position of Missouri Pacific are not binding. The real question is, what do these articles say? (Tr. pp. 15-19).

* * * * * * * *

If you will look at your records in this case, you will find that the attorneys who prepared these as counsel for the reorganization managers were the firms of Cravath, Swain & Moore, Davis, Polk, et al., and Cadwalalder, Wickersham & Taft, the very attorneys who had taken the position I quoted to you a few minutes ago against this B stock, * * * (Tr. p. 21).

* * * * * * * *

Mr. Guilfoil: • • •

Before we pass to the most important part of the case, I don't want to spend much time getting the record straight, but at one time a few years ago, Alleghany Corporation in order to, it said, protect its eight million dollar investment in the Missouri Pacific Railroad, sought to dissolve a voting trust which included securities, Missouri Pacific securities. Missouri Pacific Railroad intervened in that and sought to have a public hearing upon the issues. Included in the document filed by the railroad is one which contained a certain statement which has been quoted in the complaints filed in this Court but it has always been quoted with those little stars that denote certain omissions and I am happy to see that the Levin brief attaches our document so that the Court can see exactly what we did say. Now the part of the quotation omitted in all of the complaints was the final clause which said: "And the use of Missouri Pacific stock for exchange in acquisition of control," and I believe that everything that was said in that quoted paragraph is modified by this issuance of new Missouri Pacific securities, and this is certainly what we intended to say. Now, if our style is bad, certainly our language stood the test of success, the only interested party before the I. C. C., Alleghany, understood what we meant because Alleghany in its reply to this language, stated "Missouri Pacific alleges as a basis for its request that the vote of Class B stock owned by Alleghany, would be required when, as, and if Missouri Pacific proposes to issue stock in connection with a merger, recapitalization, stock dividend and so forth." So with this minor clarification of the quotation, and I am sure that counsel for Alleghany would concede that I have quoted accurately from Alleghany's reply, I think we ought to pass to the most important issue here (Tr. pp. 25-26).

• • • • • • • •

The Court: All right. Let me ask you another question. If the Court decides that a vote of class B stock is required to approve this merger, then that is the end of this consolidation, as I understand it, because Alleghany is opposed to this plan.

Mr. Whittlesey: I think that is a fair statement. If Alleghany and the class B stockholders—I don't think you have to confine it to Alleghany.

The Court: Well, I understand. But you have fifty-two per cent.

Mr. Whittlesey: Their vote clearly will be negative, yes (Tr. pp. 33-34).

* * * * * * * *

The Court: Gentlemen, let me ask you both a question. I assume from the tenor of the argument that everybody would like to have me pass on this voting rights question. I would also assume that whatever decision I may make you gentlemen might want to take to the Eighth Circuit Court of Appeals; is that correct?

Mr. Pomerantz: I think that is a fair statement, Your Honor.

The Court: All right. It would appear to me that rather than get into the other complex problems involved in this lawsuit, like the rights of the lawyers for fees and the jurisdiction of the Interstate Commerce Commission and all of these other collateral issues which we have before this Court, that this Court should confine itself to the one point and that is, what are the voting rights of the people involved in this lawsuit and then certify that so that the Eighth Circuit may or may not take it.

Mr. Lowenthal: May I be heard on that?

The Court: I want to be heard on this point because I want to leave here in exactly ten minutes.

Mr. Pomerantz: On behalf of Slayton, Your Honor, I say the answer is yes, we will so stipulate.

The Court: Okay.

Mr. McRoberts: The answer is yes subject to the one qualification, that is the right of appeal of a judgment on a part of the issue which I think we would like to consider and discuss with Your Honor at leisure. Subject to that qualification, the answer is yes.

The Court: All right (Tr. pp. 58-59).

Mr. Lowenthal: * * * Now with respect to the attitude and the construction of paragraph 3, and particularly 3-C, we are not dealing here, if Your Honor please, with what may be contained in an Alleghany annual report or any other outside document, we are dealing with a pleading submitted by Missouri Pacific to the Interstate Commerce Commission some two years ago with respect to the problem squarely raised by this case. When Missouri Pacific in its pleading solemnly presented to the Commission says that the Class B stock—and I am quoting verbatim—has an effective veto power over many vital and important corporate actions including such things as mergers, recapitalization, stock dividends, stock options, stock rights, equity financing, the issuance of convertible securities and the use of Missouri Pacific stock for exchange in acquisition or control. We are not dealing here with a mere stylistic matter, we are dealing here with a matter of substance in which Missouri Pacific specified the very many respects in which the Class B has a veto power. And to show you how far they went with respect to this, the Missouri Pacific brief cited, pleaded, rather, cited a case of the Supreme Court of the United States in support of their position that a class vote is required with respect to mergers and consolidations and they quoted from the—they cited the Rochester Telephone case in the Supreme Court which says that in a situation analogous to our Mo-Pac B stock you can have a veto power to block such major matters as increases or decreases of capital stock, charter amendments, consolidations or mergers. Now what is the effect of the position taken by the Missouri Pacific in this I. C. C. proceeding some two years ago? (Tr. 60-61.)

* * * * * * *

The Court: Well, you still haven't answered my question; that is, you do or do not agree we should pass on this voting right question first.

Mr. Lowenthal: Yes, I agree; it should be passed on first (Tr. p. 63).

(b) Excerpts from Briefs and Exhibits Presented Below.

(1) (From the Defendants' Joint Reply Brief in support of the motions filed in the Court below on May 13, 1964).

* * * * * * * *

For the information of the Court we attach as Exhibit "A" hereto the excerpt from "Brief of the Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company in Support of Objections to the Plan" filed in this Court In the Matter of Missouri Pacific Railroad Company, Docket No. 6935, in December, 1954, read to Your Honor on oral argument; and as Exhibit "B" hereto the excerpt from the "Reply Brief of Alleghany Corporation to Brief of Group of Institutional Investors Supporting Their Objections to the Plan" likewise filed in said proceeding in December, 1954, which was read to Your Honor on oral argument (Def. Reply Brief below p. 28).

* * * * * * * *

Exhibit "A."

Excerpt From Brief of the Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company in Support of Objections to the Plan.

"After the postponement of the exercise of rights of creditors for more than 21 years, the Commission, in an attitude of hopelessness, adopted the unsound 'agreed system plan' made between creditors and the stockholders. When this agreement was reached these proceedings had come to a state of almost complete frustration. In such circumstances the stockholders had a bargaining power entirely disproportionate to their interest in the property. The agreed system plan, in its treatment of the First and Refunding bondholders and the common stockholders of the Missouri Pacific, reflects this bargaining power. Section 77 conferred broad powers on the Commission to prevent the consummation of plans of reorganization of the kind now before the Court. The proposed new Class

B stock, although only a small fraction of the new capitalization carries voting rights. It also carries rights of veto which will enable its owners to pry further concessions from other security holders. No new equity capital or debt capital convertible into equity capital may be obtained without the permission of the owners of this minuscule voting interest (R. 35202). Thus is nuisance value recognized and preserved."

Exhibit "B."

Excerpt From Reply Brief of Alleghany Corporation to Brief of Group of Institutional Investors Supporting Their Objections to the Plan.

"The Group's Brief then states that the Class B stock 'carries rights of veto which will enable its owners to pry further concessions from other security holders.' Except in the unlikely event that the new company attempts to raise new equity capital or debt capital convertible into equity capital, both of which appear to be impractical for railroad companies, **there would appear to be no veto at all.**" (Emphasis ours.)

(2) (From Plaintiffs' Joint Response to Defendants' Reply Brief in opposition to the motions filed in the Court below on or about May 28, 1964.)

"The defendants refer (pp. 27-28 and Exh. B) to a brief submitted in 1954 by Alleghany in the reorganization proceeding, which stated that "there would appear to be no veto" "[e]xcept in the unlikely event that the new company attempts to raise new equity capital or debt capital convertible into equity capital." Since the brief did not mention mergers, the defendants argue that it constitutes an admission by Alleghany that the Class B has no veto against mergers.

The defendants' argument is self-defeating. Alleghany's 1954 brief also did not mention changes of dividend rights, of rights in liquidation, or of voting rights. According to the defendants' argument, Alleghany's 1954 brief would thus also be an admission that the Class B has no veto

against changes of those rights either. Obviously, this is not so. The Alleghany brief was filed long before the adoption of MoPac's new charter, and was simply a response to the reorganization brief of the Group of Institutional Investors, which complained that "No new equity capital or debt capital convertible into equity capital may be obtained without the permission of the owners of this [Class B] minuscule voting interest" (defendants' reply brief, Exh. A). Moreover, the defendants omit the sentences immediately following their quoted excerpt from the Alleghany 1954 brief:

> "However, this alleged veto is merely an entirely reasonable provision, not to enable the holders of Class B to obtain further concessions, but to prevent the holders of Class B from being practically eliminated by future changes in the Charter or Articles. Clauses of this kind have been found in previous Commission plans."

(Plffs. Response below p. 7.)

* * * * * * * *

(3) The Brief in Opposition to Motion to Dismiss filed by plaintiff in the Levin case has attached thereto as Appendix "A" and Appendix "B", respectively, in their entireties, the petition of the Missouri Pacific Railroad Company for Leave to Intervene and Missouri Pacific Railroad Company's Suggestions in Support of Its Request for an Oral Hearing filed with the Interstate Commerce Commission on or about October 26, 1961, in the proceeding entitled "Louisville and Jeffersonville Bridge and Railroad Company Merger, etc.", Finance Docket No. 18656.

An excerpt from said Appendix A to said Brief reads as follows:

> "By virtue of the terms and provisions of the Missouri Pacific Railroad Company's Articles of Association the holders of a majority of said Class B stock are given an effective veto power over many vital and important corporate actions including such

things as mergers, recapitalizations, stock dividends, stock options, stock rights, equity financing, the issuance of convertible securities, and the use of Missouri Pacific stock for exchange in acquisitions of control. Specifically Article VII D (3) of the Missouri Pacific's Articles of Association, the terms of which are embodied in its Class B stock certificates, provides as follows:

> "'The Company shall not, without the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3).'
>
> Thus Alleghany's holding of this Petitioner's Class B Stock represents control of that class, which class in turn controls and exercises veto power over matters and decisions of vast moment to the Missouri Pacific Railroad Company."

An excerpt from Appendix B to said Brief reads as follows:

> "As set forth in Missouri Pacific's Petition for Leave to Intervene herein the position of Alleghany in relation to Missouri Pacific is an unusual but a powerful one. If permitted to exercise ordinary voting rights Alleghany's holding of approximately 50% of Missouri Pacific's strategic Class B Stock represents an effective veto power over many vital and

important corporate actions which may be a matter of life or death to Missouri Pacific in this period of a deteriorating railroad situation. Salvation could well lay in many of the actions which Missouri Pacific B Stock controls.

Although the significant characteristic of Missouri Pacific's B Stock is that it is essentially negative, that is to say, a destructive force capable in the main of accomplishing little but to block the endeavors of others, the extreme importance of this type of negative power in corporate affairs has been recognized by the Supreme Court of the United States in **Rochester Telephone Corp. v. U. S.**, 307 U. S. 125. There a charter provision permitting 20% of a Company's stock to block such major matters as increases or decreases of capital stock, charter amendments, and consolidations or mergers was recognized as strong evidence of control.

As disclosed by its prior report and order of June 5, 1945, in **Chesapeake & Ohio Ry. Co. Purchase**, 261 I. C. C. 239, authorizing Alleghany control of C. & O., Nickel Plate and Pere Marquette, this Commission deemed it necessary that Alleghany have no position of importance at the same time in Missouri Pacific. The Commission reiterated this conclusion in its reports of March 2, and May 24, 1955, in the instant proceeding, which conclusion was implemented by the order of May 14, 1957, requiring the trusteeing of the Missouri Pacific stock now in question.

Since this Commission did not discuss the size of the block of stock held by Alleghany, or the nature or incidents of the stocks involved, its decisions must have been based on the fact that the propriety of a Company like Alleghany, controlling other great railroad systems, trusteeing its Missouri Pacific stock was so manifest as to require no labored justification. As previously stated, in Alleghany's present petition to terminate the trust there is no showing of any changed conditions or altered circumstances which would justify a different conclusion today from that reached by the Commission in 1957. This omission is manifestly due to the fact that there have been no changes in the circumstances that dictated the Com-

mission's previous determination that Alleghany should trustee this stock. To the contrary, the considerations are even stronger today against a Company like Alleghany, in control of the New York Central System, being vested with life and death power over petitioner at this period.

In its reply Alleghany states that 'under no stretch of the imagination can Alleghany control or have the power to control Missouri Pacific'. Here, of course, Alleghany assumes a favorable answer to the very issue which this Commission must decide, namely, whether the power vested in Alleghany's holding is such as to require that Alleghany be inhibited from exercising the same.

Requiring as it does a complete about-face from this Commission's prior decisions in this matter, Missouri Pacific Railroad Company knows of no better way for this matter to be properly presented to the Commission than by a full airing of the facts and arguments at a hearing. Missouri Pacific suggests that Alleghany's petition involves matters of too great importance to permit them to be resolved merely on the basis of the documents filed to date, and without the benefit of all the assistance that the Commission may receive from hearing Alleghany's case, any rebuttal testimony that Missouri Pacific may care to present, and the arguments and briefs of Counsel."

(4) Appendix to Defendants Mississippi et al., Brief in Support of Motions to Dismiss.

Appendix.

Missouri Pacific Railroad Company Reorganization.

First Plan (1940) — Original Supp.

239 I. C. C. 7-164 (Jan. 10, 1940)

240 I. C. C. 15-56 (Apr. 9, 1940)

Approved: **In re Missouri Pac. R. Co.**, 39 F. Supp. 436 (June 20, 1941)

Remanded: 50 F. Supp. 936 (July 29, 1943)

Second Plan (1944) — 2nd Supp. 3rd Supp.

257 I. C. C. 479-583 (July 4, 1944)

257 I. C. C. 745-784 (Oct. 9, 1944)

Approved: **In re Missouri Pac. R. Co.**, 64 F. Supp. 64 (Dec. 21, 1945), affd. **sub nom. Comstock v. Group of Institutional Investors, Inc.**, 163 F. 2d 350, and **New Orleans, T. & M. Ry. Co. v. Group of Institutional Investors**, 163 F. 2d 358 (Aug. 28, 1947), affd. 335 U. S. 211 (June 21, 1948)

Wright v. Group of Institutional Investors, 163 F. 2d 1022 (8th Cir. 1947) Order approving plan vacated and set aside and cause remanded to District Court with directions to return the plan to the Interstate Commerce Commission for its further investigation, consideration and recommendation.

Third Plan (1949) — 4th Supp. 5th Supp.

275 I. C. C. 59-166 (Aug. 2, 1949)

275 I. C. C. 203-260 (Dec. 29, 1949)

Approved: **In re Missouri Pac. R. Co.**, 93 F. Supp. 832 (Oct. 3, 1950), affd. **sub nom. State of Texas v. Group of Institutional Investors**, 191 F. 2d 265 (Aug. 14, 1951), cert. den. 342 U. S. 904 (Jan. 2, 1952); also in **Morris v. Group of Institutional Investors**, 342 U. S. 918 (Jan. 28, 1952), and in **Chemical Bank & Trust Co. v. Group of Institutional Investors**, 343 U. S. 929 (April 21, 1952); see dissenting memorandum of Frankfurter, J., at *ibid.*, 982 (June 9, 1952)

Fourth Plan (1954)

6th Supp.
Stipulation
7th Supp.
8th Supp.

282 I. C. C. 629-688 (Nov. 17, 1952)

Record in 225 F. 2d 761 (May 14, 1954)

290 I. C. C. 477-673 (July 29, 1954)

290 I. C. C. 674-688 (Nov. 9, 1954)

Approved: **In re Missouri Pacific Railroad Company**, 129 F. Supp. 392 (Feb. 25, 1955), affd. **sub nom. Missouri Pacific Railroad Co. 5¼% S. S. B. C. v. Thompson**, 225 F. 2d 761 (Oct. 13, 1955), cert. den. **sub nom. Albers v. Thompson**, 350 U. S. 959 (Jan. 30, 1956); 135 F. Supp. 102 (Sept. 19, 1955), affd. **sub nom. Missouri Pacific Railroad Co. 5¼% S. S. B. C. v. Thompson**, 229 F. 2d 898 (Feb. 28, 1956).

(c) Affidavit of William E. Haudek, filed April 8, 1964, with the Brief in Opposition to the Motions in the Slayton case.

United States District Court
For the Eastern District of Missouri,
Eastern Division.

Rose Slayton et al., Plaintiffs,
vs.
Missouri-Pacific Railroad Company, a Corporation, et al., Defendants,
} Cause No. 63 C 436 (2).

State of New York, County of New York. } ss.

William E. Haudek, being duly sworn, deposes and says:

I am a member of the firm of Pomerantz Levy Haudek & Block, counsel for the plaintiffs. I submit this affidavit in opposition to defendants' motions to dismiss this action.

On January 28, 1964, defendant Missouri Pacific Railroad Company ("Mopac"), Texas and Pacific Railway Company ("T&P") and Texas & Missouri Pacific Railroad Company ("T&M") filed with the Interstate Commerce Commission a verified joint application under §§ 5 (2) and 20a of the Interstate Commerce Act for an order authorizing the consolidation of Mopac and T&P with and into T&M and for other relief.

The application sometimes refers to Mopac as the "Missouri Company", and to T&M as the "Delaware Company".

The following excerpts are taken from the application:

Paragraph 1 (a) (3), p. 3:

> "The Delaware Company, organized for the purpose of carrying out the proposed transaction, has charter power to engage in transportation by railroad subject to Part I of the Interstate Commerce Act and otherwise but has not heretofore engaged in any business operations."

Paragraph 1 (a) (4), p. 4:

> "The Delaware Company has no assets other than its initial capital."

Paragraph 1 (a) (6), p. 5:

> "The Texas & Missouri Pacific Railroad Company, as previously stated, is not now engaged as a common carrier and except by this Application has not made application to engage in such business."

Paragraph 1 (b) (1) (i), p. 5:

> "The Texas & Missouri Pacific Railroad Company was incorporated on the 3rd day of December, 1963, under the laws of the State of Delaware."

Paragraph 1 (b) (1) (iv), p. 10:

> "The Missouri Pacific Railroad Company beneficially owns all of the present stock of the Texas and Missouri Pacific Railroad Company."

Paragraph 1 (b) (9), p. 13:

"The Delaware Company has no ownership or control over any carriers subject to the Interstate Commerce Act."

Paragraph 1 (b) (12), p. 23:

"The Delaware Company has outstanding 200 shares of Capital Stock of the par value of $5 per share, all of which, as previously stated, are beneficially owned by the Missouri Company."

As appears from Exhibits 1, 1-a and 1-b annexed to said application, Mopac's board of directors approved the agreement and plan of consolidation on December 4, 1963; the boards of directors of T&P and T&M approved said agreement and plan on December 3, 1963.

The agreement and plan of consolidation (Exhibit 7 of the application) is dated as of December 4, 1963. Excerpts from said agreement and plan are annexed hereto as Exhibit A.

WILLIAM E. HAUDEK.

Sworn to before me this 7th day of April, 1964.

ETHEL RADIN,
Notary Public State of New York
No. 24-8479000
Qualified in Kings County
Certf. filed N. Y. County Clerk
Commission Expires March 30, 1966

(Memorandum Opinion on Motions to Dismiss in Consolidated Cases.)

(Filed in U. S. District Court on July 13, 1964.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

Rose Slayton, et al.,
Plaintiffs,
vs.
Missouri Pacific Railroad Company, et al.,
Defendants.
No. 63 C 436 (2).

Alleghany Corporation, et al.,
Plaintiffs,
vs.
Missouri Pacific Railroad Company, et al.,
Defendants.
No. 64 C 48 (2).

Betty Levin,
Plaintiffs,
vs.
Mississippi River Fuel Corporation, et al.,
Defendants.
No. 64 C 77 (2).

Memorandum.

These three cases, consolidated for the limited purposes of pre-trial discovery and hearings on motions, in major part arise out of the agreement of the Boards of Directors of defendant Missouri Pacific Railroad Company (hereafter MoPac) and Texas and Pacific Railroad Company (hereafter T&P) to consolidate the two companies into Texas and Missouri Pacific Railroad Company (hereafter T&M), a new Delaware subsidiary of MoPac created for the purpose of the merger, upon approval of

the merger by the Interstate Commerce Commission. Subsequent to the filing of the first of these cases, MoPac, T&P and T&M applied to the ICC for an order authorizing consolidation and issuance of securities by T&M. The application to the ICC, under 49 U. S. C. A., §§ 5 (2) and 20 (a), stated, as had been announced earlier by MoPac, that the proposed merger plan would be submitted to their shareholders at an annual meeting on May 12, 1964, for approval by two-thirds of the aggregate of shareholders. Plaintiffs, all holders of Class B shares of MoPac, having filed these actions, defendants thereafter deferred any stockholders' meeting for approval of the proposed plan until the adjudication of the class voting right issue here involved.

Separate motions to dismiss have been filed by the defendant Mississippi River Fuel Corporation, owner of the majority of Class A shares of MoPac, and certain individual defendant members of the Board of Directors of MoPac and by defendant MoPac. The three cases are similar, but not identical, there being some divergence in allegations as well as type of relief sought by plaintiffs on behalf of themselves representatively as Class B stockholders and derivatively for defendant MoPac. Similarly, there is a variety of and various combinations of relief sought—declaratory, injunctive and money damages. However, common to all three cases is the demand for a declaratory judgment that the proposed consolidation requires the approval of separate majorities of both Class A and Class B stockholders of MoPac. Defendants' separate motions to dismiss are directed to all phases of the several complaints, but we here treat such motions only as they relate to the declaratory issue of class voting rights on the proposed plan of consolidation. On this issue defendants seek dismissal on the ground that the complaints and the exhibits thereunto attached show on their face that plaintiffs are not entitled to so vote and fail to state a claim on which relief can be granted. The matter has been fully briefed by all parties and on April 10, 1964, oral argument was heard by the Court.

For the purpose of the motions, the allegations of fact in the complaints and the inferences reasonably to be

drawn therefrom must be taken as true and not in issue. We therefore discuss the factual allegations as though proven and conclude as to the law. The crux of the issue presented is whether or not the plan of consolidation as approved by MoPac must be concurred in by separate majorities of Class A and Class B shareholders of MoPac.

Paragraphs 3 and 4, Article VII, Section D, of the Articles of Association of Missouri Pacific Railroad Company provide:

> "(3) The Company shall not, without the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding, (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3).
>
> "(4) Except as otherwise provided above in paragraph (3) of this Article VII, or as otherwise required by law, each share of Class A Stock and each share of Class B Stock shall have the same voting power, and the vote of the holders of all or any portion of any class of stock, as a class, shall not be required for any other action whatsoever to be taken or authorized by the stockholders of the Company, including any amendment to the Articles of Association. In all elections of directors each stockholder may cast as many votes in the aggregate as shall equal the number of voting shares which he is entitled to vote multiplied by the number of directors to be elected at the election, and each stockholder

may cast the whole number of votes, either in person or by proxy for one candidate, or distribute them among two or more candidates, and the directors shall be those persons, in a number equal to the vacancies to be filled, who shall receive the greatest number of votes."

Defendants urge first that since neither "merger" nor "consolidation" is in terms employed in paragraph 3 of Section D of Article VII, the plan for consolidation necessarily falls within paragraph 4 of Section D of Article VII as "any other action" not requiring class voting. We have considered but found this contention to be without merit since what is proscribed by paragraph 3 (c), Section D of Article VII, is "company action" without the consent of the majority of each class of shareholders, altering or changing the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A stock or of the Class B stock without regard to the purpose of such company action, whether it be merger, consolidation or otherwise. The article does not attempt to set out specific types or methods of company action which might be employed to alter or change the relative rights. In plain language, it prohibits, unless class voting is observed, company action, without limitation and without specification as to type or method when such action "alter(s) or change(s) the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock . . ."

Defendants next urge that since MoPac is not to be the surviving corporation and the proposed consolidation will, if consummated, eliminate MoPac, the action will not be MoPac Company action, but rather that of T&M. Suffice it to say that the proposed merger is the subject of an agreement entered into by MoPac on the authorization of its Board of Directors, and that MoPac at least recognizes that its consummation, resulting in the elimination of MoPac, requires at least some action by its shareholders even though questioning the requisite needed for approval. We conclude that the agreement to consolidate entered into by MoPac constitutes company action by defendant MoPac within the meaning of paragraph

3 of Article VII D if such consolidation as proposed would result in the effects enumerated in paragraph 3 (c) and (d).

Thus, the ultimate question is whether the proposed plan of consolidation or merger involves "alter(ing) or chang(ing) the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock" or amends or eliminates any of the provisions of paragraph 3 of Article VII D. If it does, separate majorities of both classes are required for approval by terms of the Articles of Association, adopted pursuant to the plan of reorganization of MoPac under Section 77 of the Bankruptcy Act, which plan was approved by the ICC on or about July 29, 1954 (290 ICC 477), approved by this Court on February 25, 1955, and confirmed by this Court on September 19, 1955.

Under applicable Missouri law, the voting requirements for adoption of the proposed plan are controlled by the Articles of Association of Missouri Pacific Railroad Company, RSMo 1959, § 351.270.

Further, under 49 U. S. C. A., § 5 (11), a carrier's authority to merge or consolidate as approved by the ICC is conditioned on the assent "of a majority, unless a different vote is required under applicable state law, in which case the number so required shall assent, . . ."

The Class A and Class B shares of MoPac were issued pursuant to the aforesaid plan of reorganization.

The issued and outstanding capital stock of MoPac consisted, as of December 16, 1963, of 1,849,576 shares of Class A no par value stock and 39,731 shares of Class B no par value stock.

Defendant Mississippi owns 1,071,895 shares of Class A stock of MoPac, or about 57% of the number of shares of the entire issued and outstanding stock of MoPac.

MoPac owns approximately 83.6% of the only class of issued and outstanding stock of The T&P.

Plaintiffs Slayton, Proskauer, Mendelsohn, Alfred L. Rose and Dorothy B. Rose are the owners of 260 shares of Class B common stock of MoPac.

Plaintiff Alleghany Corporation is the beneficial owner of in excess of 20,000 shares of Class B common stock of MoPac.

Plaintiff Empire Trust Company holds the shares of Class B common stock of MoPac, of which plaintiff Alleghany is the beneficial owner, as voting trustee for Alleghany.

Plaintiff Levin is the owner of 85 shares of Class B common stock of MoPac.

Class A shares of the reorganized company were issued to the preferred stockholders of the debtor corporation on the basis of one Class A share for each share of old preferred stock and one Class A share for each $100 of dividends accrued on the old preferred stock.

The Class B shares of the reorganized company were issued to the common stockholders of the debtor corporation on the basis of one share of Class B stock for each 20 shares of old common stock.

In approving the plan of reorganization, the ICC declared that since the Class A stock was issued to the preferred stockholders of the debtor corporation in the entire amount of the par value of their stock plus unpaid dividends, the Class A stock of the reorganized company should not participate in the earnings of the reorganized company beyond non-cumulative dividends not to exceed $5.00 per share in any one year and should not participate in the assets of the reorganized company beyond $100 per share and further declared, in providing for the issuance of the Class B stock in the reorganized company to the common stockholders of the debtor corporation, that the Class B stock would be entitled to all residual earnings and assets after the limited participation provided for the Class A stock (290 ICC 477, pp. 598, 600).

The plan of reorganization as formally approved by the ICC directed:

> "The certificate of incorporation (of the reorganized corporation) shall permit the authorization from time to time of additional shares of common

stock of either class, but shall specifically provide that the new company shall not alter or change the rights of holders of either class of stock or authorize the issuance of additional shares of either class or of any other class or of participating or convertible preferred stock, without the consent of the holders of not less than a majority of the number of shares of common stock of each class at the time outstanding." (290 ICC 477, p. 665.)

The preferences, qualifications, limitations, restrictions and special and relative rights of the Class A stock and the Class B stock, as provided by the Articles of Association of MoPac, as amended pursuant to the aforesaid plan of reorganization and as approved and directed by this Court, include the following:

Class A Stock. The Class A stockholders shall be entitled to receive, when and as declared by the Board of Directors, dividends in cash in an amount not exceeding $5.00 per share in any calendar year. Such dividends shall be non-cumulative without regard to the availability in any calendar year of earnings or any other funds lawfully available for the payment of dividends. Dividends paid on the Class A stock shall not in any event exceed $5.00 per share in any calendar year. In the event of any liquidation or dissolution or winding up of MoPac, the Class A stockholders shall be entitled to receive, out of the assets of MoPac available for distribution to its stockholders, $100 per share together with any dividends declared and unpaid on the Class A stock.

Class B Stock. After full $5.00-per-share dividends upon the Class A stock to the end of any current calendar year have been paid, or declared and a sum sufficient for the payment thereof set apart for such payment, the Class B stockholders shall be entitled to receive such dividends, without restriction as to amount, as may be declared by the Board of Directors from any funds lawfully available therefor. In the event of any liquidation or dissolution or winding up of MoPac, the Class B stockholders shall be entitled, to the exclusion of the Class A stockholders, to receive all the assets of MoPac remaining

after satisfaction of the claims of the Class A stockholders as aforesaid.

Under the proposed plan of consolidation, each Class A and each Class B share of MoPac would be exchanged for four shares of $25 par value common stock of the consolidated company and each share of the T&P would be exchanged for four shares of $25 value common stock in the consolidated company.

The proposed consolidation (under which Class A shares, entitled to dividends limited to $5.00 per year and to $100 per share on liquidation or dissolution to $100 per share, and under which Class B shares, entitled after payments of Class A $5.00 dividends to unrestricted dividends, save as they are declared by the Board of Directors, and upon liquidation or dissolution, entitled to receive all assets remaining after satisfaction of Class A claims, are both to be exchanged for identical common shares of a new company) seems so plainly and obviously to alter and change the preferences, qualifications, limitations, restrictions and special and relative rights of the Class A and the Class B shares as not to require discussion. It matters not to whose advantage the plan accrues nor whether the plan be fair or unfair. The question is whether the two classes' relative rights, restrictions and limitations are to be altered and changed. It is patent that alteration and change of relative rights, preferences and limitations and restrictions in respect to dividends and upon dissolution are inherent in the plan for the exchange of the two classes of stock for identical common stock in the proposed new company. We draw such a conclusion without regard for the graphically demonstrated financial effect of the exchange contemplated:

As of September 30, 1963, the consolidated net assets of MoPac were $394,721,242. The equity of the Class A stock in such assets, limited to $100 per share, was $184,957,600 or 47% of the total. The remaining equity of $209,763,642, constituting 53% of the total, accrued to the Class B stock, equivalent to $5,280 per share.

Consummation of the proposed plan would, as at September 30, 1963, give to the holders of the Class B stock

of MoPac, in exchange for their Class B stock, common stock of the consolidated corporation having an equity value of $7,917,594 (the equivalent of $199 per share of Class B stock), or 2% of the total, in the consolidated corporation, and would give to the Class A stockholders of MoPac, in exchange for their Class A stock, common stock of the consolidated corporation having an equity value of $368,523,721 (the equivalent of $199 per share of Class A stock), or 94.6% of the total (the remaining 3.4% going to the minority stockholders of the T&P), in the consolidated corporation.

Consummation of the proposed plan not only would change the present relative participation in equity of the Class A and Class B stockholders in MoPac from 47% and 53%, respectively, to 98% and 2%, respectively, in the consolidated corporation, but also would destroy the Class B stockholders' constantly accruing percentage increase of the total equity and fix the relative equity participation of the Class B stockholders in the corporate enterprise permanently at 2%.

The plan of consolidation, if consummated, will result in the elimination of MoPac. Hence, we conclude also that such elimination of MoPac will obliterate the provisions of paragraph 3 of Article VII, Section D, which, thus, will require for approval a majority of the number of Class A shares of MoPac and a majority of the number of Class B shares of MoPac as provided by Article VII, Section D, Paragraph 3(d).

It, therefore, follows that defendants' motions to dismiss as they relate to class voting rights on the proposed plan of consolidation will be overruled. Decision on all other issues raised by the motions to dismiss will be reserved.

Dated this 13th day of July, 1964.

JAMES H. MEREDITH,
United States District Judge.

(Order denying Motions to Dismiss Three Complaints on the Voting Rights Issue, and Reserving Decision on All Other Issues.)

(Filed in U. S. District Court on July 13, 1964.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

Rose Slayton, et al., Plaintiffs,
vs.
Missouri Pacific Railroad Company, et al., Defendants.
No. 63 C 436 (2).

Alleghany Corporation, et al., Plaintiffs,
vs.
Missouri Pacific Railroad Company, et. al., Defendants.
No. 64 C 48 (2).

Betty Levin, Plaintiff,
vs.
Mississippi River Fuel Corporation, et. al., Defendants.
No. 64 C 77 (2).

We have filed this day our memorandum respecting defendants' motions for dismissal insofar as such motions are directed to the class-voting right issue. The memorandum is hereby incorporated.

The Court has been advised by briefs and arguments and having considered the limited matter presented,

It Is Ordered that defendants' motions, insofar as they seek dismissal of the claims in each of the complaints that the agreement of consolidation heretofore approved by the directors of Missouri Pacific Railroad Company and The Texas and Pacific Railway Company may not be adopted by Missouri Pacific Railroad Company without the consent of the holders of a majority of the Class A Stock and the holders of a majority of the Class B stock of Missouri Pa-

cific Railroad Company, are denied. Decision on all other issues raised by said motions is reserved.

Dated this 13th day of July, 1964.

JAMES H. MEREDITH,
United States District Judge.

Joint Motions of Defendants to Amend Order and to Stay All Proceedings Pending Appeal.

(Filed in U. S. District Court on July 22, 1964.)

Come now all of the defendants in the above entitled actions and move the Court to amend its order of July 13, 1964, in said actions by certifying the advisability of an immediate interlocutory appeal from said Order under the provisions of 28 USCA, § 1292 (b), because said Order involves a controlling question of law as to which there is substantial ground for difference of opinion, to-wit: class voting rights of Class A and Class B shareholders of defendant Missouri Pacific Railroad Company, and because an immediate appeal from said order may materially advance the ultimate termination of litigation. Said defendants further move the Court for an order staying all proceedings in the above entitled actions pending interlocutory appeal therein.

BRYAN, CAVE, McPHEETERS & McROBERTS,
1600 Boatmen's Bank Building,
St. Louis, Missouri 63102,
CHestnut 1-6646,
By R. H. McROBERTS,
By GAYLORD C. BURKE,

HENDREN & ANDRAE,
Central Trust Building,
Jefferson City, Missouri,
By JOHN H. HENDREN,

Attorneys for Defendants Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson, C. D. Peet, John C. Bolinger, Jr., James M. Kemper, Jr.

MARK M. HENNELLY,
GILBERT P. STRELINGER,
2003 Missouri Pacific Building,
St. Louis, Missouri 63103,
MAin 1-1000,
GUILFOIL, CARUTHERS, SYMINGTON,
MONTREY & DANIEL,
434 Paul Brown Building,
St. Louis, Missouri 63101,
CHestnut 1-6980,
By THOMAS J. GUILFOIL,
Attorneys for Defendant Missouri
Pacific Railroad Company.

Copy of the foregoing Joint Motions served upon plaintiffs by mailing a copy to:

Harold C. Ackert,
Railway Exchange Building,
611 Olive Street,
St. Louis, Missouri 63101,
Attorney of record for Rose Slayton.

G. C. Stribling,
506 Olive Street,
St. Louis, Missouri 63101,
Attorney of record for Alleghany Corporation,
and

Roberts P. Elam,
319 North 4th Street,
St. Louis, Missouri 63102,
Attorney of record for Betty Levin.

this 21st day of July, 1964.

R. H. McROBERTS.

(Order That No Action Will Be Taken on Motions to Amend Order of July 13, 1964, Until After September 1, 1964.)

(Filed in U. S. District Court on July 23, 1964.)

On July 22, 1964, attorneys for all the parties in the above three captioned cases met with the Court. Attorneys for the defendants filed a motion requesting a certification under 28 U. S. C. A. 1292(b), in order that the parties may have the Court of Appeals pass on the order of July 13, 1964. The plaintiffs oppose the granting of the order, stating that they may desire to file motion for summary judgment in one or more of the cases. Agreement was reached between the parties and it is so Ordered by the Court that no action on the motion of the defendant to certify the order of July 13, 1964, under the provisions of 28 U. S. C. 1292 (b), or on other pending motions will be taken until September 1, 1964. Between now and September 1, 1964, all parties are Ordered to file such additional motions as they may desire to file so that these may be set for hearing after September 1, 1964, if oral argument is desired. The Court will take no action on any pending motions or any motions to be filed until after September 1, 1964.

Dated this 23rd day of July, 1964.

JAMES H. MEREDITH,
United States District Judge.

(Order amending Order of July 13, 1964, to permit Application for Appeal to 8th Circuit Court of Appeals pursuant to 28 U. S. C., Section 1292 (b).)

(Filed in U. S. District Court on Sept. 18, 1964.)

This matter is pending upon motion of certain defendants filed herein on July 22, 1964, to the effect that the Court certify under Title 28 U. S. C. 1292 (b) the order of the Court entered on July 13, 1964, relating to the voting rights of Class A and Class B stock of the Missouri Pacific.

The Court is of the opinion and therefore finds that the said order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the following litigation: 63 C 436 (2); 64 C 48 (2); 64 C 77 (2); and 64 C 340 (2). The motion of defendants is not opposed by the plaintiffs in this cause and is hereby granted.

It Is Hereby Ordered that this matter be certified under the aforesaid section and that all proceedings in the said cases be stayed pending the final action of the 8th Circuit Court of Appeals and that the order heretofore entered by this Court on July 13, 1964, shall be and is hereby amended by adding thereto the aforesaid findings and certification.

Dated this 18th day of September, 1964.

JAMES H. MEREDITH,
United States District Judge.

(Order of U. S. Court of Appeals granting permission to Appeal from Interlocutory Order of July 13, 1964, as Amended.)

(Filed in U. S. District Court on Oct. 14, 1964.)

United States Court of Appeals
For the Eighth Circuit.

No. 17836. September Term, 1964.

Mississippi River Fuel Corporation, et al., Appellants,
vs.
Rose Slayton, et al.

Appeal from the United States District Court for the Eastern District of Missouri.

The application of Mississippi River Fuel Corporation, et al., for permission to take an appeal under 28 U. S. C. A.,

§ 1292 (b), from the District Court's interlocutory order of July 13, 1964, as amended September 18, 1964, in Nos. 63 C 436 (2), 64 C 48 (2), 62 C 77 (2) of that Court, is granted and the taking of such appeal is hereby permitted to be proceeded with under our Rule 28.

October 12, 1964.

(Notice of Appeal in Slayton Case.)

(Filed in U. S. District Court on Oct. 15, 1964.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

Rose Slayton, Joseph M. Proskauer, Walter Mendelson, Alfred L. Rose and Dorothy B. Rose, Plaintiffs, vs. Missouri Pacific Railroad Company, Mississippi River Fuel Corporation, Perry R. Bass, William B. Bates, Glenn W. Clark, Sam B. Cook, Herbert Gussman, D. B. Jenks, James Lee Johnson, James M. Kemper, Jr., William G. Marbury, C. D. Peet, J. T. Suggs, Raymond V. Terry, Defendants.	No. 63 C 436 (2).

Notice is hereby given that Missouri Pacific Railroad Company, Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson and C. D. Peet, defendants abovenamed, hereby appeal to the United States Court of Appeals for the Eighth Circuit from this Court's interlocutory order entered in this action on July 13, 1964, as

amended by further order of this Court on September 18, 1964.

THOMAS J. GUILFOIL,
434 Paul Brown Building,
St. Louis, Missouri 63101
Chestnut 1-6890,
Attorney for Defendant,
Missouri Pacific Railroad Company,

GAYLORD C. BURKE,
1600 Boatmen's Bank Bldg.,
St. Louis, Missouri 63102,
Chestnut 1-6646,
Attorney for Defendants,
Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson, C. D. Peet.

(Notice of Appeal in Alleghany Case.)

(Filed in U. S. District Court on Oct. 15, 1964.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

Alleghany Corporation, Empire Trust Company, a Corporation, as Voting Trustee, Plaintiffs, vs. Missouri Pacific Railroad Company, Mississippi River Fuel Corporation, Perry R. Bass, William B. Bates, Glenn W. Clark, Sam B. Cook, Herbert Gussman, D. B. Jenks, James Lee Johnson, James M. Kemper, Jr., William G. Marbury, John C. Bolinger, Jr., J. T. Suggs, Raymond V. Terry, Defendants.	No. 64 C 48 (2).

Notice is hereby given that Missouri Pacific Railroad Company, Mississippi River Fuel Corporation, William G.

Marbury, Glenn W. Clark, D. B. Jenks, James Lee Johnson, John C. Bolinger, Jr., Sam B. Cook and James M. Kemper, Jr., defendants above-named, hereby appeal to the United States Court of Appeals for the Eighth Circuit from this Court's interlocutory order entered in this action on July 13, 1964, as amended by further order of this Court on September 18, 1964.

THOMAS J. GUILFOIL,
434 Paul Brown Building,
St. Louis, Missouri 63101,
Chestnut 1-6890,
Attorney for Defendant,
Missouri Pacific Railroad Company,

GAYLORD C. BURKE,
1600 Boatmen's Bank Bldg.,
St. Louis, Missouri 63102,
Chestnut 1-6646,
Attorney for Defendants,
Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, John C. Bolinger, Jr., Sam B. Cook, James M. Kemper, Jr., James Lee Johnson.

(Notice of Appeal in Levin Case.)

(Filed in U. S. District Court on Oct. 15, 1964.)

Betty Levin,

Plaintiff,

vs.

Mississippi River Fuel Corporation, Missouri Pacific Railroad Company, The Texas and Pacific Railway Company, Perry R. Bass, William B. Bates, Glenn W. Clark, Sam B. Cook, Robert H. Craft, T. C. Davis, Herbert Gussman, Downing B. Jenks, James Lee Johnson, James M. Kemper, Jr., William G. Marbury, Thomas F. Milbank, C. D. Peet, J. T. Suggs, Raymond V. Terry, John C. Bolinger, Jr.,

Defendants.

No. 64 C 77 (2).

Notice is hereby given that Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, Downing B. Jenks, James Lee Johnson, C. D. Peet, John C. Bolinger, Jr., Sam B. Cook and James M. Kemper, Jr., defendants above-named, hereby appeal to the United States Court of Appeals for the Eighth Circuit from this Court's interlocutory order entered in this action on July 13, 1964, as amended by further order of this Court on September 18, 1964.

GAYLORD C. BURKE,
1600 Boatmen's Bank Bldg.,
St. Louis, Missouri 63102,
Chestnut 1-6646,
Attorney for Defendants,
Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, Downing B. Jenks, James Lee Johnson, C. D. Peet, John C. Bolinger, Jr., Sam B. Cook, James M. Kemper.

(Docket Entries in U. S. District Court in Slayton Case.)

Slayton vs. Missouri Pacific RR Co, et al

Date	Proceedings
1963	
Dec. 9	Complaint filed. Summons ordered and issued to defts. Missouri Pacific RR Co; Miss. River Fuel Corp and Wm. G. Marbury, only.
Dec. 12	Marshal's return to summons, etc, of 12-9-63 filed. (Executed on defts (3) on 12-11-63)
Dec. 31	Separate answer of deft Mississippi River Fuel Corp to plff's complaint filed.
	Separate answer of deft Missouri Pacific RR Co to plff's complaint filed.
	Pre-trial conference had.
1964	
Jan. 2	Deft W. G. Marbury granted until Jan 21 to plead.
Jan. 10	Plff's request for issuance of summons on defts Glenn W. Clark, Sam B. Cook, D. B. Jenks, James L. Johnson and C. D. Peet, filed. Summons issued accordingly.
Jan. 21	Deft William G. Marbury granted 15 days additional time to plead.
Jan. 23	Marshal's return to service of summons issued Jan. 10, 1964, filed. (Executed on defts Clark, Jenks, and Peet on 1-15-64; upon deft Johnson on 1-22-64 and upon deft Cook on 1-17-64)
Jan. 31	By leave, Joseph M. Proskauer, Walter Mendelsohn, Alfred L. Rose and Dorothy B Rose joined as parties-plffs herein and caption of complaint amended by adding such newly joined parties as plffs herein.
	complaint amended by interlineations in accordance with memo filed.

Feb. 10 Deft. Missouri Pacific RR Co. granted to and including Feb 25th to plead to plffs' amended complaint.

Defts. Mississippi River Fuel Corp; Wm. G. Marbury; D. B. Jenks, Glenn W. Clark; Sam B Cook; James L Johnson and C. D. Peet also granted to and including Feb. 25th to plead.

Feb. 14 Plffs' Notice to defts of taking deposition of Wm. G. Marbury on March 4 filed.

Feb. 24 Joint Notice of plffs Rose Slayton, et al, of taking depositions of deft corp. Missouri Pacific RR Co by and through its Chairman of the Executive Committee & Director, Mr. Wm. G. Marbury, et al, at 2 P M on March 4, in causes 63C 436 and 64C 48, filed.

Feb. 25 Separate motion of deft Missouri Pacific RR Co to dismiss filed. Argument requested.

By leave, deft. Missouri Pacific RR Co. granted to and including March 16 to file memo. in support of its motion to dismiss.

Feb. 26 Separate motion of defts Mississippi River Fuel Corp; Wm. G. Marbury; Glenn W. Clark, D B Jenks, Sam B Cook, James L Johnson and C D Peet, to dismiss filed. Argument requested.

By leave, above motion, as well as all motions to dismiss herein, set for hearing at 10 A. M. on March 27.

Pre-trial conference had.

Mar. 5 Motion of plff Betty Levin in case 64C 77(1) to consolidate cases 63C 436, 64C 48 and 64C 77 for the purposes of trial filed by leave. Argument requested.

Motions of plffs to consolidate cases 63C 436,

Mar. 13 Case 64C 77(1) transferred from Ct 1 to Ct 2.

Pre-trial conference had.

Motions of plffs to consolidate cases 63C 436, 64C 48 and 64C 77 submitted and sustained in a

limited way, permitting the consolidation of these cases for the purposes of pre-trial discovery, motions and other matters that may be common to all cases, with permission to defts to file such separate motions as they may desire.

Setting of March 27 for hearing on motions to dismiss vacated and motions to dismiss set for hearing on April 10 at 10 A. M. Written order to be filed.

Order in accordance with above filed. Copies of order mailed to Ackerk, Giesecke & Tompkins; Pomerantz, Levy, Haudek & Block; Mark M Hennelly; Guilfoil, Caruthers, Symington, Montrey & Daniel; Bryan, Cave, Hartman, Renard & Stribling; Donovan, Leisure, Newton & Irvine; Robts P Elam; Sherin & Logden; Szold, Brandwen, Meyers, Blumberg & Altman and John Lowenthal.

Mar. 23 Defts' brief in support of motions to dismiss filed.

Mar. 24 Memo. of deft. Missouri Pacific RR Co, in support of its motion to dismiss plffs' complaint, filed. Argument requested.

Apr. 8 Memo. of Alleghany Corp. and Empire Trust Co. in opposition to defts' motion to dismiss complaint filed.

Plffs' brief in opposition to motion to dismiss, with supporting affidavit of Wm E. Haudek, filed.

Apr. 10 Separate motion of deft. MO. PaC RR Co to dismiss, and separate motion of defts Miss. River Fuel Corp; Wm G Marbury; Glenn W. Clark; D B Jenks; Sam B Cook; James L Johnson and C D Peet, to dismiss, argued.

All parties granted 2 weeks from date to file suggested findings of fact and conclusions of law in connection with the matter of voting rights only, and in addition, to file any answering briefs desired to initial briefs of parties heretofore filed. All parties granted 1 week thereafter to file reply briefs.

Apr. 27 Transcript of proceedings had during hearing on motions to dismiss filed by Official Court Reporter.

May 13 Defts' joint reply brief, with attached separate orders (3), and suggested findings of fact and conclusions of law, filed and delivered to Judge Meredith.

June 1 Plffs' joint response to defts' reply brief filed in consolidated cases herein.

July 13 Memo. Opinion filed in consolidated cases 63C 436; 64C 48 and 64C 77. Order filed. Motions of defts insofar as they seek dismissal of the claims in each of the complaints that the agreement of consolidation heretofore approved by the directors of Missouri Pacific RR Company and The Texas & Pacific Ry Company may not be adopted by Missouri Pacific RR Company without the consent of the holders of a majority of Class A Stock and holders of a Majority of Class B Stock of Missouri Pacific RR Company, are denied.

Decision on all other issues raised by said motions is reserved.

Copies of Opinion and Order handed over the counter to Robt M Sears of Guilfoil, Caruthers, Symington, Montrey & Daniel; A Duff of Fordyce, Mayne, Hartman, Renard & Stribling; Tom Pryce for Mark J. Hennelly of Mo Pac RR and to J. C. Cordonnier for Bryan, Cave, McPheeters & McRoberts. Copies of the order mailed to Robert M. Loeffler; Sherin & Lodgen; Szold, Brandwen; Meyers, Blumberg & Altman; John Lowenthal and Pomerantz, Levy, Haudek & Block.

Copy of Opinion and order mailed to Roberts P. Elam.

July 22 Pre-trial conference had in consolidated cases 63C 436; 64C 48 and 64C 77.

By leave, joint motions of defts to amend order and to stay all proceedings pending appeal, filed.

July 23 Order on pre-trial proceedings of July 22 filed.

Ordered that no action on the motion of deft to certify order of July 13, 1964, under provision of Title 28 USC, Sec 1292(b), or on other pending motions, will be taken until Sept. 1st; between now and Sept 1st all parties to file such additional motions as they may desire so that these may be set for hearing after Sept 1st, if oral argument is desired. The Court will take no action on any pending motions, or any motions to be filed, until after Sept. 1st.

copies of pre-trial order mailed to Harold C Ackert; Fordyce, Mayne, Hartman, Renard & Stribling; Roberts P. Elam; Mark M. Hennelly; Guilfoil, Caruthers, Symington, Montrey & Daniel; Bryan, Cave, McPheeters & McRoberts and to Marion S. Francis.

Sept. 18 Pre-trial conference had in consolidated cases 63C 436, 64C 48 and 64C 77.

Order filed that this matter be certified under Title 28 USC Sec. 1292(b) and that all proceedings in consolidated cases herein be stayed pending final action of the 8th Circuit Court of Appeals and amending order of July 13, 1964 by adding thereto the aforesaid findings and certification.

Copies of order mailed to Harold C Ackert; Fordyce, Mayne, Hartman, Renard & Stribling; Roberts P Elam; Mark M Hennelly; Guilfoil, Caruthers, Symington, Montrey & Daniel and Marion S Francis.

Oct. 14 Certified copy of order of USCA permitting application of Mississippi River Fuel Corp, et al, permission to take an appeal under Title 28 USCA, Sec. 1292(b) from the District Court's Interlocutory Order of July 13, 1964, as amended Sept 18, 1964, in consolidated cases 63C 436 and 64C 48 and 77, filed.

Oct. 15 Notice of appeal to USCA of defts Missouri Pacific RR Company; Mississippi River Fuel Corp; Wm. G. Marbury, Glenn W. Clark; D B Jenks; Sam B Cook, James L Johnson and C D Peet from the Interlocutory Order of July 13, 1964, as amended by further order of the Court on Sept 18, 1964, filed, and copies of said Notice forthwith mailed by the Clerk of Court to Roberts P. Elam; Harold C. Ackert and Carroll Stribling. Appeal bond in the sum of $250 filed.

Oct. 27 Designation of deft-apps Miss. River Fuel Corp; Wm. G. Marbury, Mo. Pac. RR Co., Glenn W. Clark; D. B. Jenks; Sam B Cook; James L Johnson and C. D. Peet, of contents of record on appeal, filed.

(Docket Entries in U. S. District Court in Alleghany Case.)

Alleghany Corp v. Missouri Pacific RR Co—et al

Date	Proceedings
1964	
Feb. 5	Complaint filed and summons ordered and issued to defts Missouri Pacific RR Co; Miss. River Fuel Corp, Glenn W. Clark, D. B. Jenks and Wm. G. Marbury.
Feb. 6	By leave, plffs amend the caption of their complaint by adding after the name "Empire Trust Company" the words "a corporation, as Voting Trustees." By leave, plffs amend complaint by interlineation in accordance with memo. filed.
Feb. 12	Motion of plffs Alleghany Corp and Empire Trust Co., a corp., as Voting Trustees, to consolidate within case with case 63C 436(2) for the purposes of trial, filed. Argument requested.
Feb. 17	Upon praecipe filed by plffs, summons issued to defts Sam B. Cook, James L. Johnson, James M Kemper, Jr, and John C. Bollinger, Jr.

Feb. 24 Joint Notice of plffs Rose Slayton, et al, of taking depositions of deft corp Missouri Pacific RR Co by and through its Chairman of the Executive Committee and Director, Mr. Wm. G. Marbury, et al, at 2 P M on March 4 in causes 63C 436 and 64C 48, filed.

Feb. 25 Plffs' amended complaint filed by leave.

Plffs' Exhibit A to its amended complaint filed.

Feb. 28 By leave, plffs amend their amended complaint by deletion and interlineation in accordance with memo filed.

Feb. 27 Return of U. S. Marshal, St Louis, to summons, etc, filed. (Executed on defts Mo Pac RR Co; D B Jenks; Miss. River Fuel Corp—all on 2-5-64. Executed on deft John C Bollinger, Jr, on 2-20-64)

Return of U S Marshal, St. Louis, to summons, etc, filed. (Executed on deft Marbury on 2-20-64)
Return of U S Marshal for Western Dist of Mo., to summons, etc, filed. (Executed on James M Kemper, Jr, Kansas City, on 2-24-64; upon deft Sam B Cook, Jeff City, Mo. on 2-25-64)

Mar. 5 Motion of plff Betty Levin in case 64C 77(1) to consolidate cases 63C 436, 64C 48 and 64C 77 for the purposes of trial, filed. Argument requested.

Mar. 6 Defts. Mississippi River Fuel Corp; Wm. G. Marbury; Glenn W. Clark; D. B. Jenks; James L. Johnson; John C. Bollinger, Jr; Sam B Cook and James M Kemper, Jr, granted to and including March 27 to plead. Deft. Missouri Pacific RR Co. granted to and including March 26 to plead.

Mar. 13 Case 64C 77(1) transferred from Ct 1 to Ct 2.

Pre-trial conference had.

Motions of plffs to consolidate cases submitted and sustained in a limited way, permitting the consolidation of these cases for the purposes of pre-trial discovery, motions and other matters

that may be common to all cases, with permission to defts to file such separate motions as they may desire.

Setting of March 27 for hearing on motions to dismiss, vacated, and motions to dismiss set for hearing on April 10 at 10 A. M. Written order to be filed.

Mar. 20 Separate motions of defts Miss. River Fuel Corp; Wm. G. Marbury; Glenn W Clark; D B Jenks; James L Johnson; John C Bolinger, Jr; Sam B Cook and James M Kemper, Jr, to dismiss filed.

Argument requested.

Mar. 23 Defts' brief in support of motions to dismiss filed.

Separate motion of deft Missouri Pacific RR Co to dismiss filed. Argument requested.

Apr. 3 Motion of A W Jones & Co., a partnership, etc, for leave to intervene as plffs in this action filed.

Proposed intervenors' complaint "lodged."

Apr. 8 Memo. of Alleghany Corp and Empire Trust Co in opposition to defts' motion to dismiss complaint filed.

Apr. 10 Separate motion of defts Miss. River Fuel Corp; Wm G Marbury; Glenn W Clark; D B Jenks; James Lee Johnson; John C Bolinger, Jr; Sam B Cook and James M Kepner, Jr., to dismiss, and separate motion of deft Mo Pac RR Co to dismiss, argued.

All parties granted 2 weeks from date to file suggested findings of fact and conclusions of law in connection with the matter of voting rights only, and in addition, to file any answering briefs desired to initial briefs of parties heretofore filed. All parties granted 1 week thereafter to file reply briefs.

Motion of A W Jones & Co., a Partnership, etc, for leave to intervene as plffs in this action submitted, without argument.

Apr. 27 Transcript of proceedings had during hearing on motions to dismiss filed by Official Court Reporter.

May 13 Defts' joint reply brief, with attached separate orders (3), and suggested findings of fact and conclusions of law, filed and delivered to Judge Meredith.

June 1 Plffs' joint response to defts' reply brief filed in consolidated cases herein.

July 13 Memo. Opinion filed in consolidated cases 63C 436; 64C 48 and 64C 77. Order filed, Motions of defts insofar as they seek dismissal of the claims in each of the complaints that the agreement of consolidation heretofore approved by the directors of Missouri Pacific RR Company and The Texas & Pacific Ry. Company may not be adopted by Missouri Pacific RR Company without consent of holders of a majority of Class A Stock and holders of a Majority of Class B Stock of Missouri Pacific RR Company, are denied.

Decision on all other issues raised by said motions is reserved. (copies of above mailed to attys as listed in case 63C 346(2))

July 22 Pre-trial conference had in consolidated cases 63C 436; 64C 48 and 64C 77.

By leave, joint motions of defts to amend order and to stay all proceedings pending appeal, filed.

July 23 Order on pre-trial proceedings of July 22 filed. Ordered that no action on the motion of deft to certify the order of July 13, 1964, under provision of Title 28 USC, Sec. 1292(b), or on other pending motions, will be taken until Sept 1st; between now and Sept 1st all parties to file such additional motions as they may desire so that these may be set for hearing after Sept 1, if oral argument is desired. The Court will take no action on any pending motions, or any motions to be filed, until after Sept 1st.

Sept. 18 Pre-trial conference had in consolidated cases 63C 436, 64C 48 and 64C 77.

Order filed that this matter be certified under Title 28 USC, Sec 1292(b) and that all proceedings in consolidated cases herein be stayed pending final action of the 8th Circuit Court of Appeals and amending order of July 13, 1964 by adding thereto the aforesaid findings and certification.

Copies of order mailed to Harold C. Acker; Fordyce, Mayne, Hartman, Renard & Stribling; Roberts P. Elam; Mark M. Hennelly; Guilfoil, Caruthers, Symington, Montrey & Daniel, and Marion S. Francis.

Oct. 14 Certified copy of order of USCA permitting application of Mississippi River Fuel Corp, et al, permission to take an appeal under Title 28 USCA, Sec. 1292(b) from the District Court's Interlocutory Order of July 13, 1964, as amended Sept 18, 1964, in consolidated cases 63C 436 and 64C 48 and 77, filed.

Oct. 15 Notice of appeal to USCA of defts Missouri Pacific RR Co; Miss. River Fuel Corp; Wm. G. Marbury; Glenn W. Clark; D B Jenks; James L. Johnson; John C Bolinger, Jr; Sam B Cook and James M. Kemper, Jr., from the Interlocutory Order of July 13, 1964, as amended by further order of the Court on Sept 18, 1964, filed and copies of said Notice forthwith mailed by the Clerk of the Court to Roberts P. Elam, Harold C. Ackert and Carroll Stribling. Appeal bond in the sum of $250 filed.

Oct. 27 Designation of deft-apps. Mississippi River Fuel Corp; Wm G Marbury; Glenn W Clark; D B Jenks; Sam B Cook; James L Johnson; John C. Bollinger, Jr; James M Kemper, Jr and Mo. Pac RR Co., of contents of record on appeal, filed.

(Docket Entries in U. S. District Court in Levin Case.)

Levin vs Miss. River Fuel Corp, et al

Date	Proceedings
1964	
Feb. 18	Complaint filed and summons issued.
Feb. 27	Marshal's return to summons, etc, filed. (Executed on Miss. River Fuel Corp on 2-19-64; on Glenn W Clark; Wm G Marbury; and John C Bollinger, Jr on 2-21-64; and on James Lee Johnson on 2-20-64; on defts Mo Pac RR Co; Downing B Jenks and C D Peet on 2-21-64)
	(Return of Marshal for Western District of Mo as to service of process upon Sam B Cook at Jeff. City, on 2-25-64, and upon James M Kemper, Jr at Kansas City on 2-24-64)
Feb. 28	By leave, Messrs. Stein & Seigel, Hyman Stein and Charles A. Seigel withdraw as attys for plff.
Mar. 2	Return of U S Marshal for Northern District of Texas as to service of summons, etc, upon deft The Texas & Pacific Ry Co on 2-26-64, filed.
Mar. 2	By leave, Roberts P. Elam enters his appearance as atty for plff.
Mar. 5	Motion of plff Betty Levin in case 64C 77(1) to consolidate cases 63C 436, 64C 48 and 64C 77 for the purposes of trial, filed. Argument requested.
Mar. 6	Defts. Mississippi River Fuel Corp; Wm. G. Marbury; Glenn W. Clark; Downing B. Jenks; James L. Johnson; C. D. Peet; John C. Bollinger, Jr; Sam B Cook and James M Kemper, Jr, granted extension of time to and including March 27 to plead.
Mar. 12	Defts. Missouri Pacific RR Co, et al, granted to and including April 1 to file responsive pleading herein.

Mar. 13 Case 64C 77(1) transferred from Ct 1 to Ct 2. Pre-trial conference had.

Motions of plffs to consolidate cases submitted and sustained in a limited way, permitting the consolidation of cases 63C 436, 64C 48 and 77 for the purposes of pre-trial discovery, motions and other matters that may be common to all cases, with permission to defts to file such separate motions as they may desire.

Setting of March 27 for hearing on motions to dismiss vacated and motions to dismiss set for hearing on April 10 at 10 A. M. Written order to be filed.

Mar. 17 Deft The Texas & Pacific Ry Co granted to and including April 1 to plead.

Mar. 20 Separate motion of defts Miss. River Fuel Corp; Wm. G. Marbury; Glenn W. Clark; Downing B Jenks; James L. Johnson; C. D. Peet; John C. Bolinger, Jr., Sam B Cook; and James M Kemper, Jr., to dismiss, filed. Argument requested.

Mar. 23 Defts' brief in support of motions to dismiss filed.

Apr. 1 Defts. Missouri Pacific RR Co. and Texas & Pacific Ry Co on special appearance granted to and including April 20 to plead.

Apr. 8 Memo. of Alleghany Corp and Empire Trust Co. in opposition to defts' motion to dismiss complaint filed.

Apr. 9 Plff's brief in opposition to motion to dismiss filed.

Apr. 10 Separate motion of defts Miss. River Fuel Corp; Wm G Marbury; Glenn W. Clark; Downing B Jenks; James Lee Johnson; C D Peet; John C Bolinger, Jr; Sam B Cook and James M Kemper, Jr, to dismiss, argued.

All parties granted 2 weeks from date to file suggested findings of fact and conclusions of law in

connection with the matter of voting rights only, and in addition, to file any answering briefs desired to initial briefs of parties heretofore filed.

All parties granted 1 week thereafter to file reply briefs.

Apr. 20 Separate motion of deft The Texas & Pacific Ry Co. to dismiss filed.

Separate motion of deft Missouri Pacific RR Co to dismiss filed. Argument requested on Paragraph One of said motion.

Apr. 27 Transcript of proceedings had during hearing on motions to dismiss filed by Official Court Reporter.

Apr. 28 Separate motion of deft The Texas & Pacific Ry Co. to dismiss submitted to Judge Meredith without argument; also separate motion of deft Missouri Pacific R. R. Co. to dismiss, except para. 1 thereof. Ruling on said motions to be held in abeyance until receipt of suggested findings of fact & conclusions of law & briefs as set out in minute entry of April 10th.

May 8 Separate motion of deft Missouri-Pacific RR Co to dismiss, passed to next motion docket.

May 13 Defts' joint reply brief, with attached separate orders (3) and suggested findings of fact and conclusions of law, filed and delivered to Judge Meredith.

June 1 Plffs' joint response to defts' reply brief filed in consolidated cases herein.

July 7 By leave, argument on separate motion of deft Missouri Pacific RR Co. to dismiss, passed to Sept. motion docket.

July 13 Memo. Opinion filed in consolidated cases 63C 436; 64C 48 and 64C 77. Order filed. Motions of defts insofar as they seek dismissal of the claims in each of the complaints that the agreement of consolidation heretofore approved by

the directors of Missouri Pacific RR Company and The Texas & Pacific Ry. Company may not be adopted by Missouri Pacific RR Company without consent of holders of a majority of Class A Stock and holders of a Majority of Class B Stock of Missouri Pacific RR Company, are denied.

Decision on all other issues raised by said motions is reserved. (copies of above mailed to attys as listed in case 63C 346(2))

July 22 Pre-trial conference had in consolidated cases 63C 436; 64C 48 and 64C 77.

By leave, joint motions of defts to amend order and to stay all proceedings pending appeal filed.

By leave, plff's memo. in opposition to defts' request for certification of interlocutory appeal, filed.

July 23 Order on pre-trial proceedings of July 22 filed.

Ordered that no action on the motion of deft to certify the order of July 13, 1964, under provision of Title 28 USC, Sec 1292(b), or on other pending motions, will be taken until Sept 1st; between now and Sept 1st all parties to file such additional motions as they may desire so that these may be set for hearing after Sept 1st, if oral argument is desired. The Court will take no action on any pending motions, or any motions to be filed, until after Sept 1st.

July 28 By leave, deft Missouri Pacific RR Company withdraws Par. 1 only of its separate motion to dismiss previously filed in this cause.

Sept. 18 Pre-trial conference had in consolidated cases 63C 436, 64C 48 and 64C 77.

Order filed that this matter be certified under Title 28, USC, Sec. 1292(b) and that all proceedings in consolidated cases herein be stayed pending final action of the 8th Circuit Court of Appeals and amending order of July 13, 1964 by

adding thereto the aforesaid findings and certification.

Copies of order mailed to Harold C. Acker; Fordyce, Mayne, Hartman, Renard & Stribling; Roberts P Elam; Mark M Hennelly; Guilfoil, Caruthers, Symington, Montrey & Daniel and Marion S. Francis.

Oct. 14 Certified copy of order of USCA permitting application of Mississippi River Fuel Corp, et al, permission to take an appeal under Title 28 USCA, Sec. 1292(b) from the District Court's Interlocutory Order of July 13, 1964, as amended Sept. 18, 1964, in consolidated cases 63C 436 and 64C 48 and 77, filed.

Oct. 15 Notice of appeal to USCA, of defts Mississippi River Fuel Corp; Wm. G. Marbury; Glenn W. Clark; Downing B. Jenks; James Lee Johnson; C D Peet; John C Bolinger, Jr; Sam B Cook and James M Kemper, Jr., from the Interlocutory Order of July 13, 1964, as amended by further order of the Court on Sept 18, 1964, filed and copies of said Notice forthwith mailed by the Clerk of the Court to Roberts P Elam, Harold C Ackert and Carroll Stribling. Appeal bond in sum of $250 filed.

Oct. 27 Designation of deft-apps. Mississippi River Fuel Corp; Wm. G. Marbury; Glenn W Clark; D B Jenks; Sam B Cook; James L. Johnson and C D Peet, James M Kemper, of contents of record on appeal, filed.

United States Court of Appeals

For the Eighth Circuit

No. 17,836

MISSISSIPPI RIVER FUEL CORPORATION, WILLIAM G. MARBURY, GLENN W. CLARK, D. B. JENKS, SAM B. COOK, JAMES LEE JOHNSON, C. D. PEET, JOHN C. BOLINGER, JR., JAMES M. KEMPER, JR., AND MISSOURI PACIFIC RAILROAD COMPANY,
APPELLANTS,

vs.

ROSE SLAYTON, JOSEPH M. PROSKAUER, WALTER MENDELSON, ALFRED L. ROSE AND DOROTHY B. ROSE; ALLEGHANY CORPORATION, AND EMPIRE TRUST COMPANY, A CORPORATION, AS VOTING TRUSTEE; AND BETTY LEVIN,
APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI.

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EXHIBIT A OF AFFIDAVIT OF WILLIAM E. HAUDEK (SUCH AFFIDAVIT BEING PRINTED IN THE RECORD AT PAGES 87-89)

EXHIBIT A

Agreement and Plan of Consolidation

AGREEMENT AND PLAN OF CONSOLIDATION (hereinafter sometimes called the "Agreement"), dated as of the 4th day of December, 1963, by and between the TEXAS & MISSOURI PACIFIC RAILROAD COMPANY, a Delaware corporation (hereinafter sometimes called the "Delaware Company"), and its directors or a majority thereof, MISSOURI PACIFIC RAILROAD COMPANY, a Missouri corporation (hereinafter sometimes called the "Missouri Company"), and its directors or a majority thereof, and THE TEXAS AND PACIFIC RAILWAY COMPANY, a corporation incorporated under an Act of the Congress of the United States, (hereinafter sometimes called the "Federal Company"), and its directors or a majority thereof.

WHEREAS, the TEXAS & MISSOURI PACIFIC RAILROAD COMPANY is a corporation organized and existing under the laws of the State of Delaware, having its principal office in said State at 100 West Tenth Street, Wilmington 99, Delaware, and having an authorized and outstanding capital stock consisting of 200 shares of the par value of $5 each of an aggregate par value of $1,000; and

WHEREAS, the Missouri Pacific Railroad Company is a corporation organized and existing under the laws of the State of Missouri, having been incorporated on March 5, 1917, having its principal offices at Missouri Pacific Building, St. Louis-3, Missouri, and having an authorized capital stock consisting of 4,000,000 shares of stock, without par value, divided into 3,000,000 shares of Class A Stock and

1,000,000 shares of Class B Stock, of which there are now outstanding 1,849,276 shares of Class A Stock (plus 94,050 shares of said stock reserved for the exercise or grant of stock options), and 39,731 shares of Class B Stock; and

WHEREAS, the Texas and Pacific Railway Company is a corporation which was organized and exists under an Act of Congress of the United States of America, approved March 3, 1871, and entitled "An Act to Incorporate The Texas Pacific Railroad Company and to aid in the construction of its Road, and for other purposes" as amended by Supplemental Acts thereto of May 2, 1872, March 3, 1873, June 22, 1874, February 9, 1923 and July 10, 1962, has its principal offices at Fidelity Union Tower, Dallas 1, Texas; and has an authorized capital stock of $100,000,000, of which $44,546,400 is outstanding represented by 445,464 shares of Common Stock of a par value of $100 each; and

WHEREAS, the Boards of Directors of said corporations (hereinafter sometimes collectively referred to as the "constituent corporations") deem it advisable that said corporations consolidate and have duly approved the form of this Agreement and Plan of Consolidation;

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, it is agreed that the Missouri Company and the Federal Company shall be consolidated with and into The Delaware Corporation, which shall remain a corporation of the State of Delaware, and that the terms and conditions of such consolidation, and the mode of carrying the same into effect, shall be as hereinafter set forth.

ARTICLE I

The MISSOURI PACIFIC RAILROAD COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY shall be and hereby are, on the effective date of consolidation provided for in this

Agreement, consolidated into the Delaware Company as the surviving company, the name of which shall continue to be TEXAS & MISSOURI PACIFIC RAILROAD COMPANY, a corporation of the State of Delaware.

* * * * * *

ARTICLE VII

A. The manner and basis of converting shares of stock of the constituent corporations into shares of stock of the surviving Delaware Company shall be as follows:

(1) Each share of Class A stock of the Missouri Pacific Railroad Company which shall be outstanding on the effective date of consolidation shall be changed and converted into four (4) shares of $25.00 par value Common Stock of the Texas & Missouri Pacific Railroad Company;

(2) Each share of Class B Stock of the Missouri Pacific Railroad Company which shall be outstanding on the effective date of consolidation shall be changed and converted into four (4) shares of $25.00 par value Common Stock of the Texas & Missouri Pacific Railroad Company;

(3) Each share of Common Stock of The Texas and Pacific Railway Company which shall be outstanding on the effective date of consolidation shall be changed and converted into four and four-fifths (4⅘) shares of $25.00 par value Common Stock of the Texas & Missouri Pacific Railroad Company; provided, however, all shares of capital stock of the Texas & Missouri Pacific Railroad Company that are deliverable in conversion of shares of The Texas and Pacific Railway Company which shall be owned by the Missouri Pacific Railroad Company on the effective date hereof shall thereafter be held by the Texas & Missouri Pacific Railroad Company in its treasury

and may be sold, pledged, or otherwise disposed of by said corporation as fully paid and non-assessable shares, subject to all requisites of authorization of the Interstate Commerce Commission and any other regulatory body then having jurisdiction over the issuance of the securities of the Texas & Missouri Pacific Railroad Company, at such time or times and upon such terms and conditions as may be fixed by the Board of Directors of the Texas & Missouri Pacific Railroad Company.

(4) Shares of Capital Stock of the Texas & Missouri Pacific Railroad Company which shall be outstanding on the effective date of the consolidation shall be surrendered to said company for cancellation.

B. Upon and after the effective date of consolidation, each holder of a certificate or certificates of capital stock of the Missouri Company or the Federal Company, upon surrender of such certificate or certificates for cancellation to the Delaware Company or its agent, shall be entitled to receive a certificate or certificates in definitive or temporary form, for the number of full shares of the capital stock of the Delaware Company to which such stockholder shall be entitled pursuant to the foregoing provisions, and scrip certificates for any fractional rights resulting from such exchange as hereinafter provided. If certificates are originally issued in temporary form, such certificates shall be exchangeable for definitive certificates for full shares without cost to the stockholders as soon as they shall have been prepared.

* * * * *

ARTICLE VIII

This Agreement shall be contingent upon the approval of the holders of the requisite percentages of the stock of the

constituent corporations at meetings held in accordance with law. Upon the requisite approval of the stockholders of the Delaware Company, the Federal Company and the Missouri Company this Agreement shall be binding and enforceable by any of such parties, subject only to the approval and authorization of the Interstate Commerce Commission, to which this consolidation agreement shall be submitted as soon as practicable.

Each of the constituent companies shall cause this Agreement to be duly *submitted to its* stockholders for their assent, at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose. The consolidation shall be contingent upon the assent, at each such meeting of stockholders, of a majority of the votes of the holders of the shares entitled to vote of the capital stock, unless a different vote is required under applicable state law, in which case the number so required shall assent.

The constituent companies hereto, individually or jointly as may be appropriate, (i) shall prepare, execute, file and prosecute applications to the Interstate Commerce Commission, together with any and all necessary amendments and supplements thereto, for all necessary approvals and authorizations of the consolidation and of the issuance of securities and the assumption of obligations and liabilities as provided in this Agreement, and for such other approvals or authorizations of said Commission, if any, as may be necessary or appropriate, and (ii) shall obtain any approvals or authorizations of other public authorities which may be necessary or appropriate.

* * * * * *

IN WITNESS WHEREOF, a majority of the directors of each of the constituent corporations have hereunto set their hands, and the corporate seals of each of the constituent corporations, duly attested by their respective Secretaries,

have been hereunto affixed, as of the day and year first above written.

TEXAS & MISSOURI PACIFIC RAILROAD COMPANY

By /s/ J. T. Suggs
W. G. Marbury
D. B. Jenks
Being all or a majority of the three members of the Board of Directors of Texas & Missouri Pacific Railroad Company

(Corporate Seal)

Attest: /s/ J. J. Finegan
Secretary

MISSOURI PACIFIC RAILROAD COMPANY

By /s/ D. B. Jenks
Sam B. Cook
James Kemper, Jr.
Perry R. Bass
James Lee Johnson
Raymond V. Terry
W. G. Marbury
J. T. Suggs
Robert H. Craft
Herbert Gussman
W. B. Bates
T. C. Davis
Glenn W. Clark
C. D. Peet

Being all or a majority of the fifteen members of the Board of Directors of the Missouri Pacific Railroad Company

(Corporate Seal)

Attest: /s/ C. A. Rockwell
Secretary

TEXAS AND PACIFIC RAILWAY COMPANY

By /s/ D. B. Jenks
John C. Bolinger, Jr.
J. W. Baker
J. R. Morriss
W. G. Vollmer
W. G. Marbury
J. T. Suggs
Charles S. Sharp
Raymond V. Terry
W. T. Murphy, Jr.
Russell L. Dearmont
A. Q. Peterson
J. W. Beasley

(Corporate Seal)

_____

_____

_____

_____

Being all or a majority of the seventeen members of the Board of Directors of Texas and Pacific Railway Company

Attest: /s/ R. S. Goode
Secretary

[fol. 135]

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,836

MISSISSIPPI RIVER FUEL CORPORATION, WILLIAM G. MARBURY, GLENN W. CLARK, D. B. JENKS, SAM B. COOK, JAMES LEE JOHNSON, C. D. PEET, JOHN C. BOLINGER, JR., JAMES M. KEMPER, JR., and MISSOURI PACIFIC RAILROAD COMPANY, Appellants,

v.

ROSE SLAYTON, JOSEPH M. PROSKAUER, WALTER MENDELSON, ALFRED L. ROSE and DOROTHY B. ROSE: ALLEGHANY CORPORATION, and EMPIRE TRUST COMPANY, a Corporation, as Voting Trustee: and BETTY LEVIN, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

OPINION—April 19, 1966

Before Van Oosterhout, Blackmun, and Mehaffy, Circuit Judges.

Blackmun, Circuit Judge.

This litigation is a chapter in the struggle between the holders of the respective majorities of the two classes of [fol. 136] outstanding shares of the Missouri Pacific Railroad Company (MoPac).

The district court has denied defense motions to dismiss complaints in three separate diversity actions instituted by certain Class B shareholders of MoPac. The court's ruling was one restricted to the declaratory issue

of the necessity of voting by classes on a proposed plan of consolidation of railroads. Decision on all other questions was reserved. *Slayton* v. *Missouri Pac. R.R.*, 233 F.Supp. 747 (E.D. Mo. 1964). The trial court has certified the matter under 28 U.S.C. § 1292(b) and this court has permitted the appeals from the interlocutory order. Further proceedings have been stayed.

MoPac, a Missouri corporation and an interstate common carrier by railroad, emerged as of January 1, 1955, from reorganization proceedings which had been pending under § 77 of the Bankruptcy Act, 11 U.S.C. § 205, for more than 22 years. See *Missouri Pac. R.R. Reorganization*, 290 I.C.C. 477 (1954); *In re Missouri Pac. R.R.*, 129 F.Supp. 392 (E.D. Mo. 1955), aff'd sub nom. *Missouri Pac. R.R. 5¼% S.S.B.C.* v. *Thompson*, 225 F.2d 761 (8 Cir. 1955), cert. denied 350 U.S. 959; *In re Missouri Pac. R.R.*, 135 F.Supp. 102 (E.D. Mo. 1955), aff'd sub nom. *Missouri Pac. R.R. 5¼% S.S.B.C.* v. *Thompson*, 229 F.2d 898 (8 Cir. 1956). It so emerged without preferred stock but with two classes of $100 stated capital no par voting common: Class A, which is preferentially entitled to noncumulative dividends of not to exceed $5 per share per year, and, upon liquidation or dissolution, to $100 per share plus declared but unpaid dividends; and Class B, as to which earnings and equity in excess of the Class A preferences are available. The Class A shares replaced MoPac's old preferred and accumulated dividends thereon and the Class B shares replaced MoPac's old common.

[fol. 137] Among the well-pleaded facts alleged in one or more of the three complaints and therefore, for purposes of these motions to dismiss, to be accepted as true, *Cooper* v. *Pate*, 378 U.S. 546 (1964); *Bonnot* v. *Congress of Independent Unions*, 331 F.2d 355, 357 (8 Cir. 1964), are the following:

a. MoPac has outstanding 1,849,576 shares of Class A stock and 39,731 shares of Class B stock.

b. The Texas and Pacific Railway Company (T&P) was incorporated by Act of Congress in 1871 and is an interstate common carrier by railroad. It has outstanding 445,464 shares of one class of stock. MoPac owns 369,111, or 82.86% of these shares.

c. Mississippi River Fuel Corporation (Mississippi) is a Delaware corporation. It began acquiring MoPac Class A stock in 1959. It now owns in excess of 1,071,895, or 57.95%, of the Class A shares.

d. Alleghany Corporation (Alleghany) is a Maryland corporation. Since 1958 it has owned beneficially in excess of 20,500, or 51%, of the Class B shares of MoPac. This holding is subject to a voting trust agreement between Alleghany and Empire Trust Company, a New York corporation, as voting trustee.

e. The individual plaintiffs, totaling six in the three suits, own the following amounts of MoPac's Class B shares: Rose Slayton, not stated (but presumably 10 shares); Joseph M. Proskauer, 100; Walter Mendelson, 50; Alfred L. Rose, 50; Dorothy B. Rose, 50; Betty Levin, 85.

f. Most of the named individual defendants are the present directors of MoPac. Some of them are also directors and officers of Mississippi and of T&P. Neither Mis-
[fol. 138] sissippi nor any of the individual defendants, with one exception, owns any of MoPac's Class B shares.

g. Texas & Missouri Pacific Railroad Company (T&M) is a newly organized Delaware corporation. Its equity capital consists solely of $25 par common stock.

h. MoPac's Articles of Association provide, Article VII, Section D(4), that, except for restrictions specified in Section D(3), or as otherwise required by law, each share of Class A and each share of Class B "shall have the same voting power" and that the vote of the holders of any class of stock, as a class "shall not be required for

any other action whatsoever . . . including any amendment to the Articles of Association". Section D(3), however, states that four kinds of corporate change shall not be effected without the consent of the record holders of a majority of the Class A shares and of a majority of the Class B shares. These are: (a) the issuance of additional shares; (b) the creation or issuance of any MoPac obligation or security convertible into or exchangeable for MoPac shares; (c) an alteration or change in "the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock"; and (d) the amendment or elimination of any of the provisions of Section D(3). The exact language of these portions of the MoPac Articles is set forth in the margin.[1]

[fol. 139] i. In December 1963 the boards of directors of MoPac and T&P approved an "agreement and Plan of Con-

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[1] Article VII, Section D.

"(3) The Company shall not, without the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding, (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3).

"(4) Except as otherwise provided above in paragraph (3) of this Article VII, or as otherwise required by law, each share of Class A Stock and each share of Class B Stock shall have the same voting power, and the vote of the holders of all or any portion of any class of stock, as a class, shall not be required for any other action whatsoever to be taken or authorized by the stockholders of the Company, including any amendment to the Articles of Association. . . ."

solidation" which would effect the consolidation of MoPac and T&P into T&M as the surviving corporation. The plan provides that each share of MoPac, both Class A and Class B, shall be exchanged for four shares of T&M and that each share of T&P (other than those owned by MoPac) shall be exchanged for 4.8 shares of T&M.

j. MoPac's board announced that its Class B shareholders are not entitled to vote on the plan separately and apart from its Class A shareholders and that it intended to submit the plan only to the collective vote of Class A and Class B.

k. In January 1964 MoPac, T&P and T&M filed their joint application with the Interstate Commerce Commission for an order, under § 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), authorizing the proposed consolidation and, under § 20a, 49 U.S.C. § 20a, authorizing the issuance of securities by T&M. In this application MoPac stated that it intended to submit the proposed plan to its shareholders for approval, as contemplated by § 5(11) of the Act, 49 U.S.C. § 5(11), by May 1964 by the shareholders' collective vote.

We note parenthetically at this point that, while Mississippi owns the majority of MoPac's outstanding Class A shares and Alleghany beneficially owns the majority of [fol. 140] MoPac's outstanding Class B shares, Mississippi obviously owns the majority of the total of Class A and Class B. We note further that, under the plan, the proposed one for four exchange of both Class A and Class B for T&M shares would result in the present Class B holdings being engulfed by the larger number of Class A holdings.

In 1963, after the boards' approvals of the plan but prior to its submission to the ICC, Class B shareholder Slayton instituted the first of the three suits with which this appeal is concerned. The four plaintiffs Proskauer, Mendelson, and Rose have been permitted to intervene

in that suit. The action is one against MoPac, Mississippi, and twelve individual defendants. The complaint as amended alleges, among other things, that the plaintiffs bring the action on behalf of themselves, representatively on behalf of all other (approximately 1200) Class B shareholders of MoPac, and derivatively on behalf of MoPac itself; that since about 1960 Mississippi "did and it now does control MoPac, select and dominate its directors and principal executives and determine its policies and the conduct of its affairs"; that Mississippi acquired this control illegally; that the plan "is grossly unfair and inequitable" to the Class B shareholders; that the value of one Class B share is many times greater than the value of one Class A share; that the plan is "a fraudulent and manipulative device adopted by defendants to enhance the value of the Class A shares at the expense and to the detriment of the holders of the Class B shares"; that the proposed consolidation "serves no valid or legitimate business purpose" of MoPac; that the adoption of the plan by MoPac's board "results from the illegal exercise by Mississippi of its control over" MoPac; that the approval and consummation of the plan would cause ir- [fol. 141] reparable injury to the Class B shareholders; and that the call of a MoPac shareholders' meeting to vote on the plan would cause irreparable loss and expense to MoPac. The prayer asks for damages and an injunction and also for a declaration that the Class B shareholders are entitled to vote on the plan separately and apart from the Class A shareholders.

The second action was instituted by Alleghany and Empire in February 1964. It names MoPac, Mississippi, and 12 individuals as defendants. The third action was instituted in the same month by plaintiff Levin on behalf of herself and all other Class B shareholders and derivatively on behalf of MoPac. It names as defendants Mississippi, MoPac, T&P, and 16 individuals. Generally, the allegation and prayers for relief in the complaints in

these two suits are similar to those in the Slayton complaint. One or both of them, however, contains allegations to the effect that the pursuit of the plan before the ICC will irreparably damage the Class B shareholders and effect a waste of the corporate assets of MoPac; that the class voting issue is one which lies within the jurisdiction of the district court and "not within either the purview or jurisdiction of the Interstate Commerce Commission"; and that the defendants are engaged in a course of conduct calculated to enrich themselves at the expense of the Class B shareholders. Each complaint raises the question whether approval of the plan is subject to class vote by MoPac and each requests, in addition to other relief, a declaration that the plan requires the approval of the holders of the majority of the outstanding Class B shares.

Motions to dismiss the respective complaints were filed. Submission of the plan to the MoPac shareholders was then deferred. The several motions assert, among other things, [fol. 142] that (a) the district court is without jurisdiction to pass upon the merits of the plan or the lawfulness of submitting it to MoPac shareholders and to the ICC because sole jurisdiction as to this is exclusively in the ICC and the plaintiffs therefore have an adequate remedy under § 5 of the Interstate Commerce Act, and (b) the complaints on their face show that the holders of Class B shares are not entitled to vote separately on the plan.

The parties agreed to a limited consolidation of the cases for the hearing of motions. They also agreed that the court should first pass on the voting rights question. It was recognized that if the court decided that a favorable separate vote of the Class B shareholders was necessary for the approval of the plan, then, in view of Alleghany's stated specific opposition, other questions might not require decision. Accordingly, the district court directed its attention to this initial and particular issue.

The court held, pp. 749-52 of 233 F.Supp., that said Section D(3) of MoPac's Articles did prohibit "In plain

language, . . . unless class voting is observed, company action" which alters or changes the relative rights of the two classes of stock; that the agreement to consolidate constitutes company action by MoPac; that under Missouri law, namely, V.A.M.S. § 351.270, the voting requirements are controlled by MoPac's Articles; that, in addition, under § 5(11) of the Interstate Commerce Act, a carrier's authority to consolidate is conditioned; that the proposed consolidation here "seems so plainly and obviously to alter and change the preferences, qualifications, limitations, restrictions and special and relative rights of the Class A and the Class B shares as not to require discussion"; that the plan not only would change the present relative participation in equity but also would destroy the Class B share-[fol. 143] holders' constantly accruing percentage increase of the total equity and fix their equity participation permanently at 2%; that the plan will result in the elimination of MoPac and the obliteration of Section D(3); and that it thus requires for approval a majority of the Class A shares and a majority of the Class B shares. In this posture the case comes to us.

We reverse.

We are concerned here with a proposed plan for consolidation of two interstate common carriers by railroad, MoPac and T&P, with the new T&M as the surviving corporation. This contemplated move is obviously subject to the provisions of the Interstate Commerce Act and particularly to § 5 thereof.

It seems evident, then, that our approach to the case must begin with the National Transportation Policy[2] enun-

[2] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or

ciated by Congress as part of the Transportation Act of 1940, 54 Stat. 898, 899, 49 U.S.C. preceding § 1.

The Supreme Court has stated that the policy "specifies in its terms that it is to govern the [Interstate Commerce] Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness [fol. 144] of the Commission's actions will be measured". *Schaffer Transp. Co.* v. *United States,* 355 U.S. 83, 87-88 (1957). The policy is therefore to be borne in mind, specifically, in connection with the federal statutes governing railroad consolidation. Those statutes, furthermore, have a significant and well-known history of their own which merits brief mention here.

At the conclusion of World War I, when the government was planning to return the country's railroads to private ownership, many smaller roads were financially weak and their survival was questionable. This prompted the Transportation Act of 1920, 41 Stat. 456, 481, by which Congress directed the ICC to take the initiative in developing a plan for the consolidation of American railroads "into a limited number of systems". There was, however, serious disagreement as to whether the Commission should be given the power to compel consolidation. In the end, the legislation provided that, although the Commission could promulgate a plan, it possessed no power to implement the plan. This, perhaps understandably, proved inadequate. The 1940 Act then relieved the Commission of its duty to provide a national consolidation plan. Initiation of mergers and consolidations remained, as before, in the hands

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destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act . . . shall be administered and enforced with a view to carrying out the above declaration of policy."

of the carriers. "Thus, hostility to the consolidation of railroads except by the voluntary action of the merging roads has been the undeviating policy of Congress since 1920". *St. Joe Paper Co.* v. *Atlantic C.L.R.R.*, 347 U.S. 298, 305, and appendix, pp. 315-21 (1954); *County of Marin* v. *United States*, 356 U.S. 412, 417 (1958); *Schwabacher* v. *United States*, 334 U.S. 182, 191-193 (1948).

Marin tells us that the purpose of the 1940 Act's "sweeping revision of § 5 . . . was to facilitate merger and consolidation in the national transportation system", p. 416 [fol. 145] of 356 U.S. And *Schwabacher* informs us that the tenor of prior Supreme Court decisions "was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest"; that the 1940 Act authorized approval by the Commission of voluntary consolidation of the kind contemplated by § 5(2)(a) if it will be consistent with the public interest, if, subject to any modification made by the Commission, it is just and reasonable, and if there be assent of a "majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote", § 5 (2)(b) and (11); that "When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority"; that the Commission was given complete control of the capital structure to result from a merger; that the "jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive and independent of all other state or federal authority"; that "the Commission must look for standards in passing on a voluntary merger only to the Interstate Commerce Act"; and that rights of dissenting stockholders "are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable". Pp. 192, 194, 195, 197, 198, and 201 of 334 U.S.

We necessarily assume that these pronouncements of the Supreme Court mean exactly what they say. We regard as significant the Court's emphasis on (a) the lodging of responsibility over railroad mergers in the Commission and not elsewhere; (b) the voluntary initiation by the carriers [fol. 146] themselves of proposals for consolidation; and (c) the basic supremacy of federal law.[3]

We must recognize, too, that the merits or demerits and the fairness or unfairness of a proposed railroad consolidation are not, in the first instance, matters for our jurisdiction or our concern, or for the jurisdiction or concern of the district court. These are for the expertise of the Interstate Commerce Commission. The Act, both in § 5(11) and in § 20a(7), is specific. Commission action in this area is then subject to review by a three-judge district court, 28 U.S.C. §§ 2321-25, with direct appeal to the Supreme Court, 28 U.S.C. § 1253.

There should be no argument as to this. The plaintiffs here do not really contend otherwise. Yet they devote substantial portions of their several briefs in expounding and protesting the proposed plan and its adverse and assertedly inequitable effects upon the Class B shareholders. We can sympathize, and we appreciate why the plaintiffs indulge in this approach. One observes readily what the proposed plan appears to do to the Class B holdings. See pp. 751-52 of 233 F.Supp. But we lay these aspects generally to one side because they bear primarily upon the plan's merit and thus constitute grist for the Commission and not, at this time, for the courts.

We conclude that the proposed consolidation and the plan for effectuating it are the very things which congressional policy has earmarked and preempted for the Com-

[3] It is of interest to note that Mr. Justice Frankfurter, in speaking for the dissenters in *Schwabacher*, said, p. 205 of 334 U.S.:

"The Court now holds that State law governing the relations between State-chartered carriers and their stockholders is impliedly supplanted as to those who have refused to assent to a merger. . . ."

mission, that jurisdiction over them normally and presumptively rests with that agency, and that anything [fol. 147] contrarily indicated by state law or by state charter must give way except when clearly recognized by the Interstate Commerce Act itself. We therefore are relegated to consider here only whether there is anything in the Act, which, directly or by deference to MoPac's Articles or to Missouri law, prevents or affects the Commission's exercise of this jurisdiction.

1. The Interstate Commerce Act. Section 5(2)(a) provides that it shall be lawful, with the approval and authorization of the ICC, for two or more carriers to consolidate or merge. The section then goes on to outline the administrative procedures to be followed in achieving this end. Section 5(11)[4] grants the carrier full power, when the

[4] § 5(11). "The authority conferred by this section shall be exclusive and plenary and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly,

transaction is approved by the Commission, but with an important parenthetical restriction, "to carry such transaction into effect . . . without invoking any approval under State authority"; relieves the carriers from the operation of the antitrust laws "and of all other restraints, limita- [fol. 148] tions, and prohibitions of law, Federal, State, or municipal" as may be necessary to enable them to carry into effect the Commission-approved transaction; and recites that any power given any carrier by the section "shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State".

This is broad and incisive language. We find nothing in the Act with respect to shareholder voting other than the parenthetical material in § 5(11). That material is the sole instance where the statute bows in the direction of state law.

What, then, does the statute's parenthetical language mean? And does it have application here? One immediately observes five phrases: (a) "a corporate consolidation", (b) "the assent . . . of a majority", (c) "unless a different vote", (d) is "required under applicable State law", and (e) "in which case the number so required shall assent".

No one disputes that what is sought here is a factual consolidation of MoPac and T&P. The proposed transaction would seem to qualify, then, as something to which § 5(2) and (11) and Commission jurisdiction and the parenthetical phrase all have application. Plaintiff Levin argues, however, that whether a transaction is a consolidation at all within the meaning of § 5(2) depends, wholly apart from its trappings, upon "essential character" or "primary objective". She cites *Marin*, supra, and *Wood*

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of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

v. *United States,* 132 F.Supp. 586 (S.D.N.Y. 1955), in support of this approach. In those cases the courts held transactions not to be within Commission jurisdiction. They did so, however, because of the form of the transaction itself and not because of intent or motive of the parties. [fol. 149] *Marin,* for example, concerned a corporate division or split-up, not a consolidation; at pp. 418-19 of 356 U.S. the Supreme Court expressly stated that the question of justification for the proposed transaction was not before it. We therefore are not persuaded by the Levin argument that motive of itself is a determinative factor in a transaction's qualification as a "corporate consolidation" within the language of § 5(11). See *Cleveland, C.C. & St.L. Ry.* v. *Jackson,* 22 F.2d 509 (6 Cir. 1927).

Accepting the conclusion that the parenthetical material is applicable here, it is evident that the primary standard of application is a vote of the majority of all the voting shares. The statute speaks, in the first instance, "of a majority . . . of the votes of the holders of the shares entitled to vote". Departure from this standard is, then, the exception and not the rule.

This takes us to the vital and determinative phrase, "required under applicable State law". State law in this case is Missouri's. A review of that law requires, first, a more detailed examination of MoPac's Articles.

2. MoPac's Articles. What, precisely, does Section D (3) and (4) mean and to what extent, if any, is it controlling here? The pertinent provisions of D(3) and (4) are quoted in footnote 1, supra. In requiring a vote by classes on the four specific matters the Articles state that "The Company shall not . . .". MoPac and Mississippi assert that this provision regulates only "internal" or "intracorporate" action and has no application to a consolidation. Thus, it is said, any alteration of dividend or liquidation rights of MoPac's shares or of the provisions of D(3), upon the adoption of the proposed plan, would result from the consolidation and not from action by "The Company".

[fol. 150] There is other argument in support of a restrictive interpretation of D(3), namely, (a) that nowhere in D(3) is there any reference to merger or consolidation, that is, to external action; (b) that, nevertheless, merger and consolidation obviously were not overlooked by the draftsman of the Articles for these are contemplated by the National Transportation Policy, are frequent among railroads, were considered in the MoPac reorganization proceedings and, in fact, are mentioned in D(2); (c) that nowhere in the Articles are there protective provisions for any class of stock in the event of a merger or consolidation; (d) that D(4) establishes the denial of class voting as the rule and not as the exception; (e) that special preference is to be created only by clear and unambiguous language; (f) that this standard should not be weakened by implication, particularly when a consolidation, before it can be effectuated, must be found by the Commission to be just and reasonable and consistent with the public interest; (g) that the history of the MoPac reorganization discloses an initial conviction on the part of the Commission and the courts, continuing through the third plan, that the old common was valueless, see *Texas* v. *Group of Institutional Investors,* 191 F.2d 265, 273-74 (8 Cir. 1951), cert. denied 342 U.S. 904, 918 and 343 U.S. 929, and that, with respect to the subsequently approved Agreed System Plan, the Commission refused to give the Class B stock even as much as 4% of the voting power and limited it to 2%; and (h) that it is inconceivable that it was intended to give a veto power over a consolidation to MoPac's old common shareholders, who had, at the most, only a "possible future equity", or, to put it another way, to give the veto to a bare majority, or perhaps even less, of 2% of the outstanding shares (in this case Alleghany alone), irrespective of how well the consolidation might serve the interests of the railroad, its creditors, and the public.

[fol. 151] There is contrary argument. This is to the effect (a) that the proposed plan will indeed accomplish a change in "the preferences, qualifications, limitations, re-

strictions and special or relative rights" of the Class A and Class B shares, within the meaning of D(3); (b) that MoPac will necessarily be a participant for, although T&P and T&M also must act, the plan will not come about without the approval of MoPac's board and shareholders; (c) that, thus, there is company action; (d) that it is the end result, not the means, which is significant; (e) that the purported distinction between "internal" and "external" has no basis in the Articles and is arbitrary; (f) that were a consolidation to be excluded from the prohibitory language of D(3) it would have been expressly stated, just as it was in D(2); (g) that Mo-Pac's old common shareholders received recognition in the reorganization, as finally consummated, not as a matter of grace but as a matter of right; (h) that any veto power they now possess came to them because it was fair and reasonable and because it was a recognition of rights normally accorded to equity owners; and (i) that the economic effect of the proposed plan is precisely the same as if there were an acquisition by MoPac of the properties of T&P and an issuance of MoPac stock to the minority shareholders of T&P, a procedure which, if directly pursued, would require Class B approval under D(3)(a).

These opposing points of view as to MoPac's Articles are not easily resolved. But MoPac's Articles do not stand alone. Hovering over them, as we have indicated, is §5(11). Accordingly, we move on to the Missouri law and the Articles' posture within that law.

3. The Missouri law. We encounter at once the problem of determining what is "applicable State law" here. There are several possibilities:

[fol. 152] a. V.A.M.S. ch. 388 is entitled "Railroad Corporations". Section 388.010 says the term "railroad corporation" means "all corporations . . . now owning or operating, or which may hereafter own or operate, any railroad in this state". This definition would include MoPac. Section 388.290, paragraph 1, authorizes the con-

solidation of two or more railroad companies "in this state" owning railroads "constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad". It provides for approval "by a majority in interest of all the stock held in each company". Paragraph 3 reiterates the denial of consolidation authority except when "a continuous line of roads is secured, running in the whole or in the main in the same general direction", and prohibits consolidation where "it will deprive the public of the benefit of competition between said roads". Section 388.300 authorizes a railroad company to "aid" another under specified circumstances and refers to assent thereto by "a majority of the stock of such company".

There immediately arise a number of questions as to the applicability of these chapter 388 statutes, or any of them, to the proposed plan. Some of these impress us as of no real substance. One such is the objection that T&M, being already an existing corporation, makes the plan a merger, rather than a consolidation. Another, suggested by Slayton, is that T&M is not a railroad company because it does not now operate a railroad or own one already constructed. We prefer to regard T&M as a tool organized to effect a genuine consolidation and not as something which, merely because of its present existence, renders the statute inapplicable.

More troublesome is the phrase, "in this state", which MoPac concededly describes as "somewhat obscure". This [fol. 153] must refer to something, either the state of incorporation or the location of assets, or business activity. But T&P is not a Missouri corporation and has no railroad properties in Missouri. Further, the requirement of § 388.290 that the consolidated line be a continuous one running in the same direction does not find support in the pleadings here. In addition, the predecessors of chapter 388, viz., Laws of 1869, p. 75, and Laws of 1870, p. 89, were statutes of obviously limited purpose. Finally, we enter-

tain difficulty in discerning any applicability here of § 388.300.

MoPac and Mississippi of course contend that chapter 388 and its majority vote provisions are applicable. While MoPac concedes that the history of railroad consolidation law in Missouri "is confused", it stresses that no Missouri railroad consolidation statute has ever required a class vote, although such a vote is required when a railroad corporation seeks to alter its capital structure by amendment of its articles. § 388.220, par. 2(3)(c). It also points out that Missouri railroad corporations have consolidated with foreign railroad corporations under chapter 388. *State ex rel. Wabash Ry.* v. *Roach,* 267 Mo. 300, 184 S.W. 969 (1916), is cited as one example "in which the Missouri Supreme Court took for granted the propriety of the consolidation under Chapter 388". Our reading of that case, however, see p. 972 of 184 S.W., suggests to us that the consolidation was one made pursuant to the special provisions of § 388.300.

MoPac also points out that "the last great consolidation involving a Missouri railroad", namely, that of the Missouri-Kansas-Texas, was effected through a plan precisely the same in structure as the one here proposed, and that it must have been accomplished under chapter 388 be- [fol. 154] cause the two-thirds vote otherwise required by chapter 351, hereinafter mentioned, was not present. *Missouri-Kansas-Texas R.R. Consolidation,* 312 I.C.C. 15 (1960). This may well have been the case but the material concerning that consolidation which has been submitted to us does not reveal that it was effected in the face of opposing argument. We do not find the M-K-T example any more persuasive than the contrary suggestion by plaintiff Levin that during the MoPac reorganization the ICC and the district court appear to have assumed that it was chapter 351 which applied to a merger of MoPac and a Louisiana subsidiary. P. 684 of 290 I.C.C. and p. 402 of 129 F.Supp.

We conclude that, despite chapter 388's broad titular application to railroad corporations, it is in fact confined to special situations of a kind different from the proposed plan here. It is, therefore, not "applicable State law", within the scope of § 5(11), so that its majority vote standard would control.

b. V.A.M.S. ch. 351, is entitled "General and Business Corporations". Section 351.690(3) provides that "Only those provisions of this law which supplement the existing laws applicable to railroad corporations . . . and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to" railroad corporations. If we are correct in our above analysis that chapter 388 is addressed to fact situations different from that of the proposed plan, and if we may assume, as we think we can, that the proposed plan is not one specifically prohibited by chapter 388, see, for example, § 388.290(3), then § 351.690(3) would seem to indicate that chapter 351 does have application here.

[fol. 155] Section 351.458 authorizes merger and consolidation with a foreign corporation. Section 351.420 provides that a plan of consolidation shall be submitted to a vote of the shareholders. Section 351.425 provides that the plan "shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, of each of such corporations".[5] We note in these cited sections of chapter 351 the absence of any reference to class voting and thus are tempted to conclude that, were these sections alone to be considered, class voting would not be required for a consolidation and that the only necessary vote would be that of two-thirds of all the outstanding voting shares. *Moss*

[5] The district court, when approving the fourth MoPac reorganization plan, held that this shareholder approval was not required *before* submission of the plan to the ICC. *In re Missouri Pac. R.R.*, supra, p. 402 of 129 F.Supp.

Estate, Inc. v. *Metal & Thermit Corp.*, 73 N.J. Super. 56, 179 A.2d 54, 62 (Ch. 1962).

But chapter 351 also contains § 351.270, with its provocative provisions.[6] The ultimate issue, then, is whether this section operates to make any class voting provisions of MoPac's Articles applicable to a consolidation plan when the Missouri consolidation statute itself does not impose that requirement. The district court decided this issue in the affirmative, with an unembellished reference to § 351.270, p. 750 of 233 F.Supp.

Mississippi argues that because MoPac's Articles do not provide for class voting on any consolidation, the section cannot apply. It and MoPac also argue that § 351.270's words, "required by this chapter", are important; that [fol. 156] they contemplate only the possibility of greater preponderance in voting; that, for example, they permit a requirement of more than the two-thirds vote otherwise specified by § 351.425; that, however, they cannot serve to engraft class voting on a situation where it does not otherwise exist; that, if they did permit this, the Articles would supersede the consolidation statute; that, as a principle, the applicable Missouri statutes are written into every Missouri corporate charter, including MoPac's, citing *Shapiro* v. *Tropicana Lanes, Inc.*, 371 S.W. 2d 237, 241 (Mo. Sup. 1963); *Federal United Corp.* v. *Havender*, 24 Del. Ch. 318, 11 A.2d 331, 338 (Sup. Ct. 1940), and other cases; and that, with respect to similar statutes in other states, no one has suggested the engraftment of class voting upon legislation which merely authorizes articles to provide for greater percentages.

The plaintiffs, singly or together, argue that § 351.425's silence on class voting is not negation; that § 351.055(3)

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[6] § 351.270. "Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrence of the holders of a greater portion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control this section."

authorizes classes of shares; that, therefore, class voting as well as percentages may be superimposed upon the voting percentage required by § 351.425; that the appellants' arguments would render meaningless the reference in § 351.270 to a "series" of shares because chapter 351 nowhere else speaks of a series; that a commentator upon the parallel Illinois statute has reached a conclusion opposite to that espoused by the appellants, Haller, Corporate Control Under the Illinois Business Corporation Act Through Charter and By-Law Provisions, 32 Chi. Bar Rec. 411, 413 (1951); and that it would be bizarre, indeed, to say that § 352.270 permits articles to call for a very high percentage, even all, of the voting shares but at the same time denies class voting.

Here, again, we perceive no clearcut, free-from-doubt and positive answer in these chapter 351 sections to the [fol. 157] issue of class voting under Missouri law. We do conclude that the proposed plan is one governed by chapter 351. But we are not prompted to conclude, with any assurance, that the general two-thirds-of-voting-shares standard embraced by § 351.425 is qualified by § 351.270 to the extent that it demands class voting if the articles seem to require it.

c. If, however, it be assumed that § 351.425 and § 351.270 do defer to MoPac's Articles so far as a consolidation is concerned, and if it be further granted that Mo-Pac's Articles call for a class vote on consolidation, two additional questions arise: Are the Articles then "State law", within the meaning of § 5(11)? If so, is class voting then "required" or merely permitted under that state law?

MoPac argues that whatever may be the legal status of the Articles as between MoPac and the State of Missouri, or as among its shareholders, the Articles are not organic law of the state; that the Supreme Court of Missouri has typified a business corporation as a product of private contract and the articles as a contract between the shareholders, *Shapiro* v. *Tropicana Lanes, Inc.*, supra,

p. 241 of 371 S.W.2d; that this certainly is not "applicable State law"; and, lastly, that there is an overriding public interest in the MoPac situation. Mississippi buttresses this by arguing that "State law" means statutory law and not common law or the law of contracts. There is authority which supports this approach. *Gilliam* v. *California Employment Stabilization Comm'n*, 130 Cal. App.2d 102, 278 P.2d 528, 536 (1955); *Brinckerhoff* v. *Bostwick*, 99 N.Y. 185, 1 N.E. 663, 665 (1885); *Board of Educ.* v. *Town of Greenburgh*, 277 N.Y. 193, 13 N.E.2d 768, 770 (1933); *Delta County* v. *City of Gladstone*, 305 Mich. 50, 8 N.W.2d 908, 909 (1943); *State ex rel. McKittrick* v. *Missouri Pub.* [fol. 158] *Serv. Comm'n*, 352 Mo. 29, 175 S.W.2d 857, 861 (1943); see *Travelers Health Ass'n* v. *FTC*, 298 F.2d 820, 822 (8 Cir. 1962).

The appellees' response is simply that § 351.270 authorizes charter provisions to impose class voting, that the MoPac charter provides for it, and that a class vote is therefore required under applicable state law. This reasoning may find some support in *Sellers* v. *Joseph Bancroft & Sons*, 23 Del. Ch. 13, 2 A.2d 108 (Ch. 1938).

Even without placing reliance on *Sellers*, we might favor not restricting § 5(11)'s reference to "applicable State law" to statutory material. The appellants' cited cases, which announce the general rule that a statutory reference to "law" does not include the common law, recognize that a different result follows when context so requires. *Greenburgh*, supra, p. 770 of 13 N.E.2d; *Gilliam*, supra, pp. 536-37 of 278 P.2d. We think of no persuasive reason for regarding § 5(11) as distinguishing between a statutory provision for a class vote and a charter provision for it pursuant to statutory authority. Also, the statute speaks of a vote *under*, rather than *by*, state law; "under" does not connote quite so strongly the specification of a statute but, rather, rights and duties measured by law generally. And there is some indication in the ICC regulations for adherence to charter provisions in consolidation proceedings. 49 C.F.R. 352.3 (1940).

Be that as it may, we are driven to the word "required" in § 5(11). "Required" implies something mandatory, not something permitted by agreement. The difference in concept has been judicially recognized. *In re Boyd*, 213 Fed. 774, 775-76 (2 Cir. 1914); *Huey* v. *Waldrop*, 141 Ala. 318, 37 So. 380 (1904).

[fol. 159] We conclude that the MoPac Articles and the Missouri railroad and business corporation statutes do not provide material which carries us far enough. In summary, and in repetition: We hold that the proposed plan is one for a "corporate consolidation" and that the parenthetical material of § 5(11) is applicable. We conclude that a majority of all voting shares in the aggregate is the general standard and that the statute bows in the direction of state law only with its phrase beginning with "unless". We also conclude that chapter 351 has application to the proposed plan. But, while there are significant contrary arguments, we are not persuaded either (a) that MoPac's Articles call for a class vote on a consolidation, or (b) that, if they do, § 351.270, by its reference to the articles, demands a class vote, or (c) that, even if it does, class voting is something "required under applicable State law". In our view, the Class B shareholders must surmount each and all of these hurdles in order to prevail. We are not convinced that they have surmounted any of them. We are impressed with the significance of the national transportation policy and its emphasis on railroad consolidation, with the stated exclusive and plenary character of § 5(11), and with its consequent preemptive nature. All this compels us, when we entertain doubt for the contrary result, as we do here, to resolve that doubt on the side of those provisions of the statute which bespeak the rule and not on the side of those which provide the exceptions.

We take comfort in the fact that, if we err in our conclusions, the Class B shareholders still possess that protection, inherent in § 5(2)(b), which is always available to those affected by Commission action on a consolidation

plan, namely, that the plan be consistent with the public interest and just and reasonable, and that it is subject to the usual court review. Our present decision, although ad- [fol. 160] verse to the Class B shareholders, does not deprive them of anything which may properly be presented before the Commission and on such review.

Perhaps we should add a final word about two lines of argument which appear in the respective briefs:

1. Each side asserts that in the past the other has adopted a position not consistent with that now espoused. Collateral estoppel, equitable estoppel, and res judicata are all suggested. We are satisfied that any inconsistency, to the extent it is present at all, is not of such dignity or surrounded with such circumstances as support either estoppel or res judicata. One or more of the accepted essentials for these legal results is absent in each instance.

2. The appellees assert that, in any event, the district court's conclusion was a permissible one upon a doubtful question of state law. The question here, however, is a matter which primarily concerns the interpretation of § 5(11). This is a federal statute. Despite its interplay with the Missouri law, our difference with the district court relates to this statute and the national transportation policy. As a consequence, our perhaps too frequent pronouncements about our unwillingness to override a permissible conclusion reached by an experienced trial judge as to a doubtful question of the law of his state, see *Homolla* v. *Gluck*, 248 F.2d 731, 733-34 (8 Cir. 1957), has no persuasive application here.

The order of the district court is reversed and the case remanded.

[fol. 161]

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,836—September Term, 1965

MISSISSIPPI RIVER FUEL CORPORATION, WILLIAM G. MARBURY, GLENN W. CLARK, D. B. JENKS, SAM B. COOK, JAMES LEE JOHNSON, C. D. PEET, JOHN C. BOLINGER, JR., JAMES M. KEMPER, JR., and MISSOURI PACIFIC RAILROAD COMPANY, Appellants,

v.

ROSE SLAYTON, JOSEPH M. PROSKAUER, WALTER MENDELSON, ALFRED L. ROSE and DOROTHY B. ROSE; ALLEGHANY CORPORATION, and EMPIRE TRUST COMPANY, a corporation, as Voting Trustee; and BETTY LEVIN.

Appeal from the United States District Court for the Eastern District of Missouri.

JUDGMENT—April 19, 1966

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in this cause be, and the same is hereby, reversed with costs; and that Mississippi River Fuel Corporation, William G. Marbury, Glenn W. Clark, D. B. Jenks, Sam B. Cook, James Lee Johnson, C. D. Peet, John C. Bolinger, Jr., James M. Kemper, Jr., and Missouri Pacific Railroad Company, have and recover against Rose Slayton, Joseph M. Proskauer, Walter Mendelson, Alfred L. Rose and Dorothy B. Rose; Alleghany Corpo-

ration, and Empire Trust Company, a corporation, as Vot-
[fol. 162] ing Trustee; and Betty Levin, the sum of Six Hundred Eighty-nine and 62/100 ($689.62) Dollars for their costs in this behalf expended, and have execution therefor.

And it is further Ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the Opinion of this Court this day filed herein.

April 19, 1966.

[fol. 163]

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,836—September Term, 1965

MISSISSIPPI RIVER FUEL CORPORATION, WILLIAM G. MARBURY, GLENN W. CLARK, D. B. JENKS, SAM B. COOK, JAMES LEE JOHNSON, C. D. PEET, JOHN C. BOLINGER, JR., JAMES H. KEMPER, JR., and MISSOURI PACIFIC RAILROAD COMPANY, Appellants,

v.

ROSE SLAYTON, JOSEPH M. PROSKAUER, WALTER MENDELSON, ALFRED L. ROSE and DOROTHY B. ROSE; ALLEGHANY CORPORATION, and EMPIRE TRUST COMPANY, a corporation, as Voting Trustee; and BETTY LEVIN.

Appeal from the United States District Court
for the Eastern District of Missouri.

ORDER STAYING ISSUANCE OF MANDATE PENDING CERTIORARI PROCEEDINGS IN SUPREME COURT, U. S.—May 3, 1966

On Consideration of the Motion of Appellees Alleghany Corporation and Empire Trust Company, as Voting Trustee, for a stay of the mandate in this cause pending a

petition to the Supreme Court of the United States for a writ of certiorari, It is now here Ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that [fol. 164] a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 3, 1966.

[fol. 165] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 166]

SUPREME COURT OF THE UNITED STATES

No. 352—October Term, 1966

BETTY LEVIN, etc., Petitioner,

v.

MISSISSIPPI RIVER FUEL CORPORATION, et al.

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari in the United States Court of Appeals for the Eighth Circuit is granted. The case is consolidated with No. 359 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Fortas took no part in the consideration or decision of this petition.

[fol. 167]

SUPREME COURT OF THE UNITED STATES

No. 359—October Term, 1966

ALLEGHANY CORPORATION, et al., Petitioners,

v.

MISSISSIPPI RIVER FUEL CORPORATION, et al.

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is consolidated with No. 352 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Fortas took no part in the consideration or decision of this petition.